TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 77.

A. L. SMALLEY AND P. McGILLIAN, PLAINTIFFS IN ERROR,

vs.

GEORGE F. LAUGHEAR AND JANE LAUGHEAR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JULY 30, 1888.

(19,695.)

(19,035.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 384.

A. L. SMALLEY AND F. McLELLAN, PLAINTIFFS IN ERROR,

vs.

GEORGE F. LAUGENOUR AND JANE LAUGENOUR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 A. L. SMALLEY and F. McLELLAN, Respondents,
v.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, Appellants; JOHN F. Green and Harry Gilliland, Defendants.

From supreme court of the State of Washington to the Supreme Court of the United States.

[Seal of the Supreme Court, State of Washington.]

2 4241.

Filed Mar. 25, 1902.

C. S. REINHART, *Clerk.*
F. S. GUYOT, *Dep.*

3 In the Superior Court of Lincoln County, State of Washington.

A. L. SMALLEY and F. McLELLAN, Plaintiffs,
vs.
GEO. F. LAUGENOUR & JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants. } Complaint.

The plaintiff- complains and alleges:

1. That during all of the times in this complaint mentioned the defendants Geo. F. Laugenour and Jane Laugenour were and still are husband and wife.

2. That on the 23rd. day of May, 1900, the plaintiffs A. L. Smalley and F. McLellan were seized in fee and possessed, and entitled to the immediate possession of the following described lands and tenements, towit: The E. ½ of section 33 in tp. 23 N. R. 37, E. W. M. in Lincoln county, Washington.

3. That at all times since said 23rd. day of May, 1900, plaintiff- were and still are the owners in fee and entitled to the immediate possession of said premises, the same being held in common by said plaintiffs.

4. That while the plaintiffs were so seized, the defendants above mentioned, or or about the 25 day of May, 1900, and without right or title entered into possession of said premises, and now un-lawfully with-hold the possession thereof from plaintiffs, to their damage in the sum of $100.00.

5. That the value of the rents, issues, and profits of said premises from said 25 day of May, 1900, and while the plaintiffs have been excluded therefrom by the defendants, is $500.00.

4 Wherefore, plaintiffs pray:

1. For the restitution of said premises.

2. For the sum of $100.00 damages, for the with-holding thereof.

3. For $500.00 the value of the rents and profits thereof.
4. For costs and general relief.

MYERS & WARREN,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, }
County of Lincoln, } ss:

F. McLellan, being first duly sworn, deposes and says that he is one of the plaintiffs above mentioned, and that he has read the foregoing complaint, and the same is true as he verily believes.

F. McLELLAN.

Subscribed and sworn to before me this 13" day of *Huly*, 1900.

H. A. P. MYERS,
Notary Public, Residing at Davenport, Washington.

Filed Aug. 8, 1900.
W. H. YARWOOD, *Clerk.*

5 In the Superior Court of the State of Washington in and for the County of Spokane.

A. L. SMALLEY and L. McLELLAND, Plaintiffs,
vs.
GEO. F. LAUGENOUR and JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants. } Demurrer.

Come now the defendants Geo. F. Laugenour, Jane Laugenour, John F. Green, and Harry Gilliland, and demur to plaintiffs' complaint and as ground of demurrer allege:

1. That the court has no jurisdiction of the person of the defendants, or any of them, or of the subject matter of this action.
2. That neither of the plaintiffs have any legal capacity to sue.
3. That there is another action pending between the same parties for the same cause.
4. That there is a defect of parties plaintiff.
5. That several causes of action have been improperly united.
6. That the complaint does not state facts sufficient to constitute a cause of action.
7. That the action has not been commenced with- the time limited by law.

CROW & WILLIAMS,
Attorneys for Defendants.

Due and legal service of the within demurrer is hereby admitted this 13 day of August, 1900.

MYERS & WARREN,
Attorneys for Plaintiff-.

Filed August 13, 1900.
W. H. YARWOOD, *Clerk,*
By ED. YARWOOD, *Dep.*

6 In the Superior Court of Lincoln County, State of Washington.

A. L. SMALLEY and F. MCLELLAN, Plaintiffs,
vs.
GEO. F. LAUGENOUR ET AL., Defendants. } Order.

This cause came on regularly for hearing this day upon the defendants' demurrer to the complaint, the plaintiffs appearing by their attorneys, Myers & Warren, and defendants submitting the cause upon written brief.

After due consideration, it is ordered and adjudged that said demurrer be, and the same is hereby overruled and denied, to all of which defendants except.

The defendants are hereby allowed 10 days in which to answer.

Dated this 21 day of August, 1900.

C. H. NEAL, *Judge.*

Filed August 21 1900.
W. H. YARWOOD, *Clerk.*

7 In the Superior Court of the State of Washington in and for the County of Spokane.

A. L. SMALLEY and F. MCLELLAND, Plaintiffs,
vs.
GEO. F. LAUGENOUR, JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants. } No. —. Answer.

Come now the defendants Geo. F. Laugenour, Jane Laugenour, John F. Green, and Harry Gilliland, and for answer to the plaintiffs' complaint,

1. Admit the allegations contained in paragraph 1 of said complaint.

2. Deny each and every allegation, matter, and thing in paragraph 2 of said complaint contained.

3. Deny each and every allegation, matter, and thing in paragraph 3 of said complaint contained.

4. Deny each and every allegation, matter and thing in paragraph 4 of said complaint contained.

5. Deny each and every allegation, matter, and thing in paragraph 5 of said complaint contained.

I.

For a first, separate, further and affirmative answer to said complaint, said defendants allege:

1. That on the 16th. day of March, 1895, and for a long time prior thereto and for a long time subsequent to the said day, the

plaintiff F. McLelland, was a married man, residing in the State of Washington with his then wife.

2. That if the said plaintiff- in this action have any right, title or interest in or to the real estate in plaintiffs' complaint
8 described, the same was acquired wholly by virtue of a certain pretended judgment entered in the office of the clerk of the superior court of Lincoln county, Washington, on or about March 16, 1895, in favor of plaintiffs in an action then pending, wherein the plaintiffs A. L. Smalley and F. McLelland, and one L. J. Hutchings, partners doing business under the firm name and style of L. J. Hutchings & Co. were plaintiffs, and the defendant Geo. F. Laugenour was defendant, and by virtue of a pretended sale of the real estate in the complaint described under and by virtue of the said pretended judgment, which pretended sale was made on or about May 13, A. D. 1899, by virtue of the said pretended judgment and an *alias* execution issued out of said court on April 12, 1899.

3. That at said pretended sale, the said plaintiff-, A. L. Smalley and F. McLelland, were the purchasers of said real estate, and the consideration for the said purchase was wholly paid by the satisfaction of said pretended judgment.

4. That the interest of said defendant, F. McLelland, in said pretended judgment was the community property of the said plaintiff and his then wife, and that any interest of the said plaintiff, F. McLelland in or to the said real estate is the community property of the said plaintiff and of his said wife and her estate, and the said wife of the said plaintiff is a necessary party plaintiff.

5. That the name of the wife of the said plaintiff, F. McLelland, is to these defendants unknown, but they allege on information and belief that the name of said wife was Mrs. F. McLelland.

II.

For a second separate, further, and affirmative answer to said complaint these defendants allege:

1. That if the said plaintiffs have any right, title, or interest in or to the real estate in their complaint mentioned and described, the same was acquired wholly by virtue of a certain pretended
9 judgment entered in the office of the clerk of Lincoln county, on or about the 16th. day of March, 1895, in favor of the plaintiffs, in an action then pending in the superior court, wherein the plaintiffs A. L. Smalley, F. McLelland, and one L. J. Hutchings, partners doing business under the firm name and style of L. J. Hutchings & Co. are plaintiffs, and the defendant Geo. F. Laugenour was defendant and by virtue of a pretended *alias* execution issued out of said superior court and a pretended sale under said execution on or about May 13, 1899, in which the purchasers at said sale were the plaintiffs, A. L. Smalley and F. McLelland, and as these defendants are advised and believe, said L. J. Hutchings, and that the only consideration paid by the said purchasers at the said sale was by the satisfaction of said pretended judgment.

2. That any interest or right acquired under the said judgment of said execution and sale was the partnership property and interest of the said judgment creditors and the said firm of L. J. Hutchings & Co. and said L. J. Hutchings is the owner of an undivided interest of any right or title acquired under said sale, and is a necessary party plaintiff in this action.

3. That any right or title which the said plaintiffs may have in or to said real estate, or any part thereof, is a partnership interest and the same is not held in common by plaintiffs so as to permit them to maintain an action in their individual capacity.

III.

For a third, separate, further, and affirmative defense to said complaint, these defendants allege:

1. That the defendant Geo. F. Laugenour was on May 13, 1899, and for many years prior thereto had been and at all times since said date has been the owner of the fee simple title in and to the following described premises, towit: East half (½) of section
10 thirty-three (33) in township twenty-three (23), north of range thirty-seven (37) E. W. M. in Lincoln county, Washington, being the same property described in plaintiffs' complaint, and at all of said times has been and is now in the exclusive possession of said real estate, and entitled to said possession, the said defendants' title to said real estate being subject to a mortgage thereon. That the title to said real estate was acquired during the coverture of the defendants Geo. F. Laugenour and Jane Laugenour with money acquired by the result of their joint labors during coverture.

2. That on or about the 16th day of March, 1895, in an action then pending in the superior court of Lincoln county, Washington, wherein the plaintiffs A. L. Smalley and F. McLelland, and one L. J. Hutchings, partners under the firm name and style of L. J. Hutchings & Co. were plaintiffs, and the defendant Geo. F. Laugenour was defendant, a pretended judgment was entered in the said court in favor of said plaintiffs and against the defendant. That the court in entering said judgment was wholly without jurisdiction over the person of the defendant, Geo. F. Laugenour, and the said judgment was and is absolutely void. That the said pretended judgment was entered on a pretended claim which was not contracted for the benefit of the cummunity composed of the said defendants Geo. F. Laugenour and Jane Laugenour, and if such indebtedness existed, it was the separate debt of the said defendant, Geo. F. Laugenour.

3. That after the entry of the said pretended judgment, and on or about the 13th day of May, 1899, an attempt was made to sell said real estate for the satisfaction of the said pretended judgment and at said pretended sale, the plaintiffs herein being the purchasers and the consideration for the said purchase was the satisfaction of the said pretended judgment, and the only claim which the said plaintiffs have in or to said real estate or any part thereof as
11 these defendants are informed and believe is by virtue of the said pretended judgment and of said pretended sale for the satisfaction thereof.

4. That on May 10, 1899, the said defendant Geo. F. Laugenour, filed a voluntary petition in bankruptcy in the office of the clerk of the district court for the district of Washington, eastern division, at Spokane, Washington, the said petition being filed in triplicate, and thereupon and on said day the judge of said district being absent, the said petition was by the clerk of said court duly and regularly referred to the Honorable Adolph Munter, referee in bankruptcy for said district at Spokane, Washington, and such proceedings were thereafter had that on May 11, 1899, said defendant, Geo. Laugenour, was duly and regularly adjudged a bankrupt within the purview of the act of Congress relating to bankruptcy.

5. That in the said petition in voluntary bankruptcy the names of all of the creditors of the said bankrupt, and especially the names of the said judgment creditors above mentioned were given with their place of residence, and all of the property of said bankrupt was scheduled, and particularly the real estate above described, which real estate was claimed in the said petition in bankruptcy to be exempt to the said bankrupt under the laws of the State of Washington.

6. That after the said adjudication of bankruptcy and on said day the Honorable Adolph Munter, referee in bankruptcy, notified as required by said act of Congress relating to bankruptcy, all of the creditors of said bankrupt, and especially the plaintiffs in this action, to present their claims against said bankrupt, and further that the first meeting of creditors would be held June 5, 1899, at 2 o'clock p. m. That on said June 5, 1899, at 2 o'clock p. m. no creditors appeared for the purpose of electing a trustee, and the schedules
12 showing no property applicable to the payment of debts, it was ordered by said Honorable Adolph Munter, referee, that no necessity existed for the appointment of a trustee in bankruptcy in said proceedings.

7. That thereafter and on the 9th. day of August, 1899, an order was regularly made by the Honorable C. H. Hanford, judge of the said district, discharging the said Geo. F. Laugenour from all debts and claims which are made provable by the said act against his estate, and which existed on the 10th. day of May, 1899, except such debts as were by law specially excepted from the operation of discharge in bankruptcy of the said act of Congress relating to bankruptcy. That said order of discharge has never been revoked and no application to revoke the same has ever been made.

8. That on the 12th. day of August 1899, said Honorable C. H. Hanford, judge of the said district in the said bankruptcy proceedings, regularly made an order setting aside to the said bankrupt, Geo. F. Laugenour, as exempt under the act of Congress relating to bankruptcy, the real estate hereinbefore described, and awarding said real estate to the said bankrupt discharged from any and all claims of his creditors.

9. That prior to the issuance of the said pretended execution and of the said pretended sale thereunder, said defendant Geo. F. Laugenour pledged to the Oregon Mortgage Company, which said company

holds a mortgage on the real estate above described prior in date to the said pretended judgment, all of the landlord's interest in and to the crops grown or to be grown on said land, and the rents, issues and profits therefrom to be applied upon the interest then due and to become due on said mortgage and upon the principal of said loan. That the said mortgage has never been paid, and the said Oregon Mortgage Company has a first claim on the rents, issues, and profits of said land for the year 1900.

13 IV.

The defendant, John F. Green, disclaims any right, title or interest or any claim to the real estate above described and has never asserted any claim to the said real estate or any part thereof or the rents, issues, or profits therefrom.

V.

The defendant Harry Gilliland disclaims any interest in or to the real estate in question, except that he is the holder of a lease for the said real estate for the year 1900, from the defendant, Geo. F. Laugenour, and is entitled to the possession of the said premises under said lease, and said defendant has never claimed any other or different right or authority in or to said premises.

Wherefore: said defendants, Geo. F. Laugenour, Jane Laugenour, and Harry Gilliland pray that the said plaintiffs take nothing by their said action, that any cloud on the title of the said defendants Geo. F. Laugenour and Jane Laugenour, by reason of said pretended judgment and sale herein mentioned may be removed, and their title to the said real estate may be quieted, and that they recover of and from the plaintiffs their costs and disbursements in this action, and for such other and further relief as may be equitable.

The said defendant, John F. Green, prays that he may be dismissed from this action with his costs taxed against plaintiffs.

CROW & WILLIAMS,
Attorneys for Defendants.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jane Laugenour, being first duly sworn, on her oath, deposes and says; that she is one of the defendants in the above action, that she has read the above and foregoing answer, knows the contents thereof, and believes the same to be true.

JANE LAUGENOUR.

Subscribed and sworn to before me this 29th. day of August A. D. 1900.

JAS. A. WILLIAMS,
Notary Public for Washington, Residing at Spokane.

14 STATE OF WASHINGTON, } ss:
County of Spokane, }

Service of the within answer by a true copy thereof admitted this 31 day of August, 1900.

MYERS & WARREN,
Attorneys for Plaintiffs.

Filed Sept. 5 1900. at 1-30 o'clock p. m.

W. H. YARWOOD, *Clerk,*
By ED. YARWOOD, *Dep't.*

15 STATE OF WASHINGTON, } ss:
County of Lincoln }

In the Superior Court of said County.

A. L. SMALLEY and F. McLELLAN, Plaintiffs,
vs.
GEO. F. LAUGENOUR and JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants. } Reply.

Comes now the plaintiffs, and replying to the answer of the defendants herein, say:—

1. Admit paragraphs one and two of said defendants' first, separate and affirmative defense.

2. Deny paragraphs one, two, and three of defendants' second separate and affirmative defense, except as hereinafter admitted.

3. Admits that the real estate described in the complaint was acquired during the coverture of defendants, Geo. F. Laugenour and Jane Laugenour his wife, with money acquired by the result of their joint labors during coverture. Admits paragraph two (2) of defendants' third, further, and separate defense down to and including the word "defendant" in the seventh line thereof, and denies each and every other allegation in said paragraph. Admits that on or about the 13th day of May 1899 said real estate was sold by the sheriff of Lincoln county, Washington, to the plaintiffs by virtue of an alias execution issued upon the judgment mentioned in paragraph one (1) page 2 of defendants' answer. As to paragraphs 4, 5, 6, 7, 8, and 9 of defendants' third, further, and affirmative defense, plaintiffs say that *that* they have not sufficient knowledge or information to judge of the truth of the same, and they therefore deny each and every allegation in said paragraphs contained.

And plaintiffs now deny specifically and generally each and every allegation, matter and thing in said answer contained, except
16 as hereinbefore and hereinafter specifically admitted.

For a further, separate, and affirmative reply to said answer, plaintiffs aver:—

1. That on the 16th. day of March, 1895, the plaintiff F. McLellan was a married man, and that thereafter and on or about the 13th. day of June, 1897, defendant's said wife died intestate in Lincoln county Washington, without issue, and thereafter and on or about the 16th. day of February, 1900 and after the sale of said real estate to plaintiffs said F. McLellan was married to Dacy McLellan, who is his present wife.

2. That the indebtedness evidenced by said judgment rendered on the 16th. day of March, 1895, against this defendant Geo. Laugenour, was for and on account of goods, wares, and merchandise sold and delivered to said Laugenour, during the coverture of said Geo. F. Laugenour and Jane Laugenour, and the same was used by said Laugenour, his wife and family, for their maintenance and support, and the same constituted and was and is the community debt of the said defendants Geo. F. Laugenour and Jane Laugenour, and was not the separate debt of the defendant Geo. F. Laugenour.

3. That on the date of the rendition of said judgment, to-wit, on the 16th. day of March, 1895, said Geo. F. Laugenour and Jane Laugenour were the owners in fee simple of said real estate, and the said judgment immediately after its rendition and filing, became and constituted, under the laws of this State, a lien thereon; and said lien which culminated in the aforesaid sale of said real estate to plaintiffs, was obtained and created pursuant to said suit, and more than four (4) months prior to the filing of the alleged petition in bankruptcy mentioned in par. 4 of page 4 of defendants' answer.

Wherefore: plaintiffs pray judgment as demanded in their complaint.

MYERS & WARREN,
Attorneys for Plaintiff.

17 STATE OF WASHINGTON, } ss:
County of Lincoln, }

F. McLellan, being first duly sworn, deposes and says that he is one of the plaintiffs in this action and makes this verification for and on behalf of said plaintiffs; that he has read the foregoing reply and believes the same to be true.

F. McLELLAN.

Subscribed and sworn to before me this 6" day of Feb. 1901.

H. A. P. MYERS,
Notary Public, Residing at Davenport, Washington.

Filed February 8, 1901.
W. H. YARWOOD, *Clerk.*

18 In the Superior Court of Lincoln County, State of Washington.

A. L. SMALLEY and L. McLELLAN, Plaintiffs,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants.

Cause No. 2598. Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 15th day of April 1901, upon issues of fact raised by the pleadings. The plaintiffs appearing by Myers & Warren, their attorneys, and the defendants appearing by Crow & Williams, their attorneys. A jury was waived by the said parties in open court, thereupon witnesses were sworn and examined on behalf of said parties and documentary proof was adduced and the court having heard the evidence and arguments of counsel and having carefully examined the pleadings herein, and being fully advised in the premises, does make the following findings of fact and conclusions of law.

Findings of Fact.

1. That for at least fifteen (15) years last past the defendant-George F. Laugenour and Jane Laugenour were and still are husband and wife living together as such.

2. That on the 16th. day of March, 1895, and for several years prior thereto and at all times since said date, until the 13th. day of May, 1899, the defendants George F. Laugenour and Jane Laugenour were the owners in fee simple of the east one-half of section thirty-three (33) in township twenty-three, north of range thirty-seven E. W. M. in Lincoln county, Washington. That the title to said real estate was acquired during the coverture of said
19 Laugenour and wife, with money acquired by the result of their joint labors during marriage. and the same was the community property of the said defendants.

3. That on or about the — day of ——, 1894, an action was commenced in the above court wherein A. L. Smalley, F. McLellan, and one L. J. Hutchins were plaintiffs, and said George F. Laugenour was defendant; that said defendant was duly and personally served with a copy of the summons and complaint in said action; that such proceedings were had in said cause as that on the 16th. day of March 1895 a judgment was duly rendered in said cause in favor of the plaintiffs therein and against said George F. Laugenour for the sum of three hundred and sixty-three and 45/100 dollars, besides attorneys' fees and costs of suit; that the debt evidenced by said judgment was incurred for the mutual benefit and advantage of said Laugenour and his wife, and the same was a community debt of said George F. Laugenour and Jane Laugenour, his wife.

4. That on the 12th. day of April, 1899, an execution was duly and regularly issued in said cause by the clerk of the superior court of Lincoln county, Washington; that under said execution the sheriff of Lincoln county, Washington, duly levied upon the real estate in question and duly and regularly advertised the same for sale as required by law, and thereafter and on, to-wit, the 13th. day of May, 1899, the sheriff of Lincoln county, Washington, duly sold said premises to the plaintiffs A. L. Smalley and F. McLellan, for the sum of five hundred thirty-two and 15/100 dollars ($532.15) which was the entire amount due on said judgment, and a sheriff's certificate of sale was duly and regularly issued therefor and delivered to the plaintiffs.

5. That after said sale, and on, to-wit, the 27th. day of May, 1899, the superior court of Lincoln county, Washington, duly made and entered an order in said cause confirming said sale to the plaintiffs, and adjudging and declaring that said sale was valid, regular and legal in all particulars.

20 6. That on the 23rd. day of May, 1900, and more than one year after said sale, the sheriff of Lincoln county, Washington, duly made and delivered to plaintiffs, a sheriff's deed to said premises described in paragraph two of these findings; and thereafter said sheriff's deed was duly presented to the clerk of the superior court and by him duly entered in the book of lebies of said court. And that sheriff's deed was on the 4th. day of June, 1900, filed for record with the county auditor of Lincoln county, Washington, and the same is now of record in said office in Book "8" of Deeds, at page 147.

7. That at all times since said sale the defendants George F. Laugenour and Jane Laugenour, his wife, have been in possession of said real estate claiming to be the owners of the same; and for several years last past said defendants have resided in Spokane county, Washington, and said premises during said times were occupied by the defendant, Harry Gilliland, as the tenant of said Laugenours.

8. That the value of the rents and profits of said real estate — since the evidence does not show rents & profits.

8. That after said sale and on, to-wit, the 6th day of February, 1900, the plaintiff F. McLellan was married; but said McLellan's interest in said real estate was and is his own separate property, owned by him prior to his marriage, and his wife is therefore not a necessary party plaintiff.

10. That the said A. L. Smalley, F. McLellan, and L. J. Hutchings were at the time of obtaining said judgment partners doing business under the firm name of L. J. Hutchings & Company, and the said judgment was taken on a partnership debt due to said partners.

11. That the said defendant F. McLelland was at the time of the entry of said judgment aforesaid a married man, and since said time his said wife has died June 15, 1897, intestate and without issue, and the said F. McLelland thereafter intermarried with his present wife, July 6, 1900.

21 12. That on May 10, 1899, the said defendant George F. Laugenour filed in the office of the clerk of the district court for the district of Washington, eastern division, at Spokane, Spokane county, Washington, his voluntary petition in bankruptcy, the same being filed in triplicate, and thereupon and on said day the judge of said court being absent, the said petition was by the clerk of said court duly and regularly referred to the Honorable Adolph Munter referee in bankruptcy for said court at Spokane, Washington, and such proceedings were thereafter had that on May 11, 1899, said defendant George F. Laugenour was duly and regularly adjudged a bankrupt, within the purvue of the act of Congress relating to bankruptcy.

13. That in the said petition in voluntary bankruptcy the names all the creditors of said bankrupt, and especially of said judgment creditors above named, were regularly given, with their places of residence and the amounts of their claims, and all of the property of said bankrupt was scheduled, and particularly the real estate hereinbefore mentioned, which real estate was claimed by the said bankrupt in the schedules filed to be exempt under the laws of the State of Washington and the act of Congress relating to bankruptcy.

14. That after the said adjudication of bankruptcy and on said day the Honorable Adolph Munter, referee in bankruptcy, notified, as required by said act of Congress relating to bankruptcy, all of the creditors of said petitioner, and especially plaintiffs, to present their claims against the said bankrupt, and further advised them of the time of the first meeting of creditors. That at the said first meeting of creditors no creditors appeared for the purpose of electing a trustee, and the schedule showing no property applicable to the payment of debts it was found by the said referee that no necessity existed for the appointment of a trustee in bankruptcy in said proceedings.

22 15. That thereafter and on the 9th. day of August, 1899, an order was regularly made by the Honorable C. H. Hanford, judge of said district, discharging the said bankrupt from all debts and claims made provable by the act of Congress relating to bankruptcy, against said estate, and which existed on the 10th. day of May, 1899, except such debts as were by law especially exempted from the operation of the discharge in bankruptcy. That said order of discharge has never been revoked, and no application to revoke the same has ever been made.

16. That on the 12th. day of August, 1899, said C. H. Hanford, judge of said district court, regularly made an order in said bankruptcy proceedings setting aside to said bankrupt as exempt under the act of Congress relating to bankruptcy, the real estate hereinbefore described, and awarded the said real estate to said bankrupt.

17. That prior to the issuance of said execution hereinbefore mentioned and the sale thereunder said defendant George F. Laugenour pledged to the Oregon Mortgage Company, a corporation, which at all of said times held and now holds a mortgage on said real estate, the crop grown and to be grown on said property, for the payment

of interest due and to become due thereunder, and any rents received therefrom since said time have been applied to the discharge of said mortgage indebtedness.

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds as follows, to wit:

1. That the plaintiffs are entitled to a judgment, adjudging and decreeing that—all times since the 13th. day of May, 1899, they were the owners and entitled to the possession of the premises and adjudging that the defendants George F. Laugenour, Jane Laugenour, his wife, Harry Gilliland and John F. Green have no right, title, or interest whatever therein; and for plaintiffs' costs and dis-
23 bursements.

2. That plaintiffs are entitled to a judgment for the immediate restitution of said premises.

3. That the plaintiffs are entitled to a judgment against the defendants George F. Laugenour and Jane Laugenour, for the sum of $—, being the value of the rents and profits of said premises since the — day of ——, —.

It is therefore ordered that judgment and decree be entered accordingly.

Done in open court this 9th. day of July, 1901.

C. H. NEAL, *Judge.*

Filed July 9, 1901.

W. H. YARWOOD, *Clerk.*

24 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY and F. MCLELLAN, Plaintiffs, *v.* GEO. F. LAUGENOUR, JANE LAUGENOUR, His Wife; JOHN F. Green, and Harry Gilliland, Defendants.	# 2598. Exceptions to Findings of Fact and Conclusions of Law.

Comes now the above named defendant- Geo. F. Laugenour and Jane Laugenour, and except to the findings of fact and conclusions of law made and filed by the court in the above entitled cause as follows, towit:

1. Except to finding of fact # 2 as proposed by the plaintiffs for the reason that the same is not supported by the evidence.

2. Except to finding of fact # 3 for the reason that there is no evidence to support the said finding.

3. Except to plaintiffs' proposed finding of fact # 4 for the reason that the same is not supported by the evidence in this cause.

4. Except to finding of fact # 7 as proposed by plaintiff-, for the reason that there is no evidence to support the said finding of fact or any part thereof.

5. Except to finding of fact # 9 as proposed by plaintiff- for the reason that there is no evidence to support the said finding.

6. Except to the refusal of the court to sign defendants' proposed findings numbers 1, 2, 3, 4, 5, 6, 7, and 8.

7. Except to the modification made by the court in finding # 15 as proposed by the defendants.

8. Except to the modification made in finding # 10 as proposed by the defendants.

25 *Conclusions of Law.*

The defendants except to conclusions of law numbers 1, 2, and 3, as made by the court for the reason that none of said conclusions are supported by the evidence or any findings of fact made by the court.

2. Except to the refusal of the court to sign conclusions of law numbers 1, 2, 3, 4, 5, 6, and 7 as proposed by the defendants.

CROW & WILLIAMS,
Attorneys for said Defendants.

Filed July 13 1901.
W. H. YARWOOD, *Clerk.*

26 In the Superior Court of Lincoln County, State of Washington.

A. L. SMALLEY and F. McLELLAN, Plaintiffs,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants. } Decree.

This cause came on regularly for trial on the 15th. day of April 1901, upon the issues of fact raised by the pleadings. The plaintiffs appeared by their attorneys, Myers & Warren, and the defendants appeared by their attorneys, Crow & Williams. Thereupon witnesses were sworn and examined, and documentary proof adduced on behalf of said parties; and the court having heard the evidence and the arguments of counsel, and the court having filed its findings of fact and conclusions of law herein, now in accordance with said findings of fact and conclusions of law, it is ordered, adjudged and decreed as follows:

1. It is ordered, adjudged, and decreed that at the time of the bringing of this action and at all times since the 15th day of May,

1899, the plaintiffs A. L. Smalley and F. McLellan were and are now the owners and entitled to the immediate possession of the following described real estate, to wit: the east half (½) of section thirty-three (33), in township twnety-three (23), north of range thirty-seven (37) E. W. M. in Lincoln county, Washington; that neither of the defendants, nor any one of them, have any real estate in nor are any of them entitled to the possession of said real estate nor any part thereof.

2. It is further ordered, adjudged, and decreed that the said plaintiffs do have and recover immediate possession of said real estate; and the clerk of this court is hereby ordered and directed to
27 issue any and all process or writs necessary and proper in order to deliver the possession of said real estate to plaintiffs.

3. It is further ordered, adjudged and decreed that the plaintiffs do have and recover of and from the defendants George F. Laugenour and Jane Laugenour, his wife, the sum of $— as rents and profits of said premises since plaintiffs have been entitled to the possession of the same.

4. It is further ordered, adjudged, and decreed that the plaintiffs do have and recover of and from the defendants George F. Laugenour and Jane Laugenour, his wife, their costs and disbursements herein taxed at $21.00.

Let execution issue accordingly.

Done in open court this 9″ day of July, 1901.

C. H. NEAL, *Judge.*

Filed July 9 1901.

W. H. YARWOOD, *Clerk.*

28 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY and F. MCLELLAND, Plaintiffs,
vs.
GEORGE F. LAUGENOUR, JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants.
} # —. Notice of Appeal.

To the above named plaintiffs, A. L. Smalley and L. McLelland, and to Messrs. Myers & Warren, your attorneys:

You and each of you are hereby notified that George F. Laugenour and Jane Laugenour, his wife, appeal and do hereby appeal to the supreme court of the State of Washington from the final judgment of the superior court of Lincoln county, Washington, in the above entitled action, said judgment having been entered in this action on the 9th day of July, A. D. 1901, and that said defendants George F. Laugenour and Jane Laugenour, his wife, hereby appeal to the supreme court of the State of Washington from each and every part of said judgment in favor of the plaintiffs, A. L. Smalley and L. McLelland, and against the said defendants.

Of all of which you will take due notice.
Dated at Spokane, Washington, October 2, 1901.

H. N. MARTIN,
CROW & WILLIAMS,
Attorneys for Defendants Laugenour.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Service of the within notice by a true copy thereof admitted this 7th. day of Oct. 1901.

MYERS & WARREN,
Attorneys for Plaintiffs.

Filed Oct. 9th. 1901.
W. H. YARWOOD, *Clerk,*
By ED YARWOOD, *Dep't.*

29 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY and F. MCLELLAND, Plaintiffs,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants.
} #—. Acceptance of Service.

We hereby accept service of the original notice of appeal in this case, which said service was made on the 5th. day of October, A. D. 1901, a copy of said notice of appeal being hereto attached and made a part of this acceptance.

CROW & WILLIAMS,
Attorneys for Defendants John F. Green and Harry Gilliland.

Filed Oct. 10, 1901.
W. H. YARWOOD, *Clerk.*

30 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY and L. MCLELLAND, Plaintiffs,
vs.
GEORGE F. LAUGENOUR, JANE LAUGENOUR, His Wife; John F. Green, and Harry G. Gilliland, Defendants.
} #—. Bond on Appeal.

Know all men by these presents that we, George F. Laugenour as principal and F. R. Mendenhall as surety are held and firmly bound unto the above named plaintiffs, A. L. Smalley and L. McLelland,

in the full and penal sum of two hundred ($200.00) dollars, lawful money of the United States, for the payment whereof well and truly to be made we do bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 11th. day of October, A. D. 1901.

The condition of the above obligation is such that, whereas, on the 9th. day of July, A. D. 1901, the above named superior court of the State of Washington in and for the county of Lincoln made and entered in the above entitled action a certain judgment in favor of the aforesaid plaintiffs and against the above named defendants, and,

Whereas: the said defendants George F. Laugenour and Jane Laugenour his wife have given, served, and filed notice of appeal herein from the said judgment to the supreme court of the State of Washington,

Now, therefore, if the above bounden George F. Laugenour shall pay all costs and damages that may be awarded against him on said appeal, or on the dismissal thereof, not exceeding $200.00 then this obligation shall be null and void, otherwise the same shall be and remain in full force and effect in law.

GEO. G. LAUGENOUR,
JANE LAUGENOUR,
By CROW & WILLIAMS, [SEAL.]
Their Attorneys.
F. R. MENDENHALL. [SEAL.]

31 STATE OF WASHINGTON, } ss:
County of Spokane, }

F. R. Mendenhall, being first duly sworn on his oath deposes and says that he is the surety named in the above and foregoing obligation; that he is not an attorney or counsellor at law, sheriff, clerk of the superior court, or other officer of said court, and that he is worth the sum of four hundred ($400.00) dollars in separate property within the State of Washington, over and above all debts and liabilities, and exclusive of property exempt from execution.

F. R. MENDENHALL.

Subscribed and sworn to before me this 11th. day of October, 1901.

JAS. A. WILLIAMS,
Notary Public for Washington, Residing at Spokane.

Filed Oct. 12, 1901.

W. H. YARWOOD, *Clerk,*
By ED YARWOOD, *Dep't.*

32 STATE OF WASHINGTON, } ss:
County of Lincoln, }

I, W. H. Yarwood, clerk of the superior court of the State of Washington, within and for the county of Lincoln, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the records and files in the above entitled action as I have been directed by the appellants, Geo. F. Laugenour and Jane Laugenour, his wife, to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of the superior court this 11th day of January, 1902.

[Superior Court Seal.]

W. H. YARWOOD, *Clerk.*

Endorsement: # 2598. Filed Jan. 11 1902 at — o'clock — m. W. H. Yarwood, clerk.

33 In the Supreme Court of the State of Washington.

A. L. SMALLEY and F. MCCLELLAN, Plaintiffs,
v.
GEO. F. LAUGENOUR and JANE LAUGENOUR, His Wife, Defendants. } #—. Cost Bill.

Attorneys' fee, statutory	$25.00
Transcript of records on appeal	6.50
Printer's bill, opening brief on appeal	20.15
Docket fee, supreme court	10.00
Printer's bill, reply brief	18.00
	$79.95

CROW & WILLIAMS,
Attorneys for Appellants.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jas. A. Williams, being first duly sworn, on his oath deposes and says: that he is one of the attorneys for appellants in the above action; that the above and foregoing is a true and correct statement of the costs necessarily incurred on the appeal to the supreme court in this action.

JAS. A. WILLIAMS.

Subscribed and sworn to before me this 14th day of November, 1902.

DENTON M. CROW,
Notary Public for Washington, Residing at Spokane.

Service of the above cost bill hereby admitted, this 16″ day of November, 1902.

MYERS & WARREN,
Attorneys for Respondents.

Endorsement: 4241. Filed Nov. 19 1902. C. S. Reinhart, clerk.

34 4241.

STATE OF WASHINGTON, } ss:
County of Lincoln, }

I, W. H. Yarwood, clerk of the superior court of Lincoln county Washington, do hereby certify that the foregoing is a full, true, and correct supplemental transcript of so much of the records in the above entitled cause as I have been directed by the appellants to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of said superior court this 18″ day of March, A. D. 1902.

W. H. YARWOOD, *Clerk.*
——, *Deputy.*

Filed Mar. 25 1902
C. S. REINHART, *Clerk.*
F. S. GUYOT, *Dep.*

35 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY and F. MCLELLAND, Plaintiffs,
v.
GEORGE F. LAUGENOUR, JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants. } #—. Affidavit.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jas. A. Williams, being first duly sworn, on his oath deposes and says; that he is a member of the law firm of Crow & Williams, which has appeared as attorneys for the defendants Laugenour in the above case; that affiant has had exclusive charge of said case, and knows all of the facts connected therewith; that on July 9, 1901, the decree was filed in this cause, and thereafter and on October 5, 1901, the said firm of Crow & Williams, of which this affiant is a member, mailed to Messrs. Myer- & Warren, the attorneys for plaintiff-, at Davenport, Washington, the original and a copy of the notice of appeal in this action, with the request that said Myers & Warren should accept service at once, and return the said original

notice of appeal to said Crow & Williams. That there was considerable delay in said notice of appeal being returned, and the original thereof was not returned to the said firm of Crow & Williams until the 9th. day of October, 1901.

That on the 7th. day of October, 1901, the said original notice of appeal not having been returned, this affiant, on behalf of said firm of Crow & Williams, and on behalf of the said defendants John F. Green and Harry Gilliland, accepted service of said notice of
36 appeal by the writing which appears in the transcript in this cause. That the said acceptance of service was so made by said Crow & Williams on said October 7th. 1901, and no acceptance was made on any other date, and said acceptance was at said time signed. That through inadvertence, the date of said acceptance is given therein as October 5, when in truth and in fact the said acceptance was signed on October 7, as hereinbefore alleged.

That affiant did not discover the said error in said acceptance of service until after the service and filing of appellants' opening brief herein, and that it had been the intention of affiant to accept service on said original notice of appeal, but affiant was unable to do so by reason of the delay in the return of said original, as hereinbefore stated.

JAS. A. WILLIAMS.

Subscribed and sworn to before me this 14 day of March, 1902.
DENTON M. CROW.
Notary Public for Washington, Residing at Spokane.

Filed March 18, 1902.
W. H. YARWOOD, *Clerk.*
—— ——, *Deputy.*

37 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY & F. MCLELLAND, Plaintiffs,
vs.
GEORGE F. LAUGENOUR, JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants.
} #—. Acceptance of Service.

We hereby accept service of the original notice of appeal in this case, which said service was made on the 7th. day of October A. D. 1901, a copy of said notice of appeal being hereto attached and made a part of this acceptance.

CROW & WILLIAMS,
Attorneys for Defendants John F. Green and Harry Gilliland.

Filed Mar. 18 1902.
W. H YARWOOD, *Clerk.*
—— ——, *Deputy.*

38 In the Superior Court of the State of Washington in and for the County of Lincoln.

A. L. SMALLEY and F. McCLELLAND, Plaintiffs,
v.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, His Wife; John F. Green, and Harry Gilliland, Defendants.
} #—. Notice of Appeal.

To the above named plaintiffs, A. L. Smalley and F. McLelland, and to Messrs. Myers & Warren, your attorneys:

You and each of you are hereby notified that George F. Laugenour and Jane Laugenour, his wife, appeal and do hereby appeal to the supreme court of the State of Washington from the final judgment of the superior court of Lincoln county, Washington, in the above entitled action, said judgment having been entered in this action on the 7th. day of July, A. D. 1901, and that said defendants George F. Laugenour and Jane Laugenour, his wife, hereby appeal to the supreme court of the State of Washington from each and every part of said judgment in favor of the plaintiffs, A. L. Smalley and F. McLelland and against the said defendants.

Of all of which you will take due notice.

Dated at Spokane, Washington, October 2, 1901.

CROW & WILLIAMS,
Attorneys for Defendants Laugenour.

Endorsement: Filed Mar. 18, 1902, at — o'clock —. m. W. H. Yarwood, clerk.

39 *Supplemental Transcript.*

40 STATE OF WASHINGTON, *County of Lincoln,* } *ss:*

In the Superior Court of Lincoln County, State of Washington.

A. L. SMALLEY and F. McLELLAND, Plaintiffs,
vs.
GEO. F. LAUGENOUR & JANE LAUGENOUR, His Wife; John F. Green, & Harry Gilliland, Defendants.
} Summons.

The State of Washington to the said Geo. F. Laugenour & Jane Laugenour, his wife; John F. Green, & Harry Gilliland, defendants:

You are hereby summoned and required to appear within twenty days after the service of this summons, exclusive of the day of serv-

ice, answer the complaint and serve a copy of your answer on the person whose name is subscribed to this summons, at the place specified following his name, and defend the above entitled action, in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the clerk of said court, a copy of which is herewith served upon you.

MYERS & WARREN,
Attorneys for Plaintiffs.

P. O. address Davenport, Wash.

Sheriff's Return of Service by Leaving with.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Cause No. —.

I, C. A. Cole, sheriff of said Spokane county, in said State, do hereby certify, that I served the within summons & complaint
41 upon the within named defendant Geo. F. Laugenour in the county of Spokane, State of Washington, on the 16th day of July, 1900, by then and there delivering to and leaving with Mrs. E. J. Laugenour at the dwelling house, and the house of the usual abode of the said defendant, Geo. F. Laugenour for said defendant, a true copy of said summons & complaint in said action, certified to be such by —— ——. The said Mrs. Geo. F. Laugenour being then and there a person of suitable age and discretion, and a member of the family of said defendant, to-wit: the wife of said defendant, I, after due diligence and inquiry being unable to find said defendant in said county.

Witness my hand this 16 day of July, A. D. 1900.

C. A. COLE,
Sheriff of Spokane County, Washington,
By F. K. PUGH, *Deputy.*

Filed Aug. 18, 1900.
W. H. YARWOOD, *Clerk.*

42 STATE OF WASHINGTON, } ss:
County of Lincoln, }

I, W. H. Yarwood, clerk of the superior court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the respondents to transmit to the supreme court.

In testimony whereof, I have hereunto set my hand and the seal of said superior court this 4" day of February, 1902.

[Seal of Superior Court.]

W. H. YARWOOD, *Clerk.*

Endorsement: 4241. In supreme court. Smalley *et al. v.* Laugenour *et al.* Supplemental transcript. Filed Feb. 4 1902 at — o'clock — m. W. H. Yarwood, clerk. Filed Mar. 25 1902 C. S. Reinhart, clerk. F. S. Guyot, dep.

43 A. L. SMALLEY and F. MCLELLAND, Respondents, *vs.* GEO. F. LAUGENOUR and JANE LAUGENOUR, Appellants, and John F. Green and Harry Gilliland, Defendants. | No. 4241. Filed Nov. 12, 1902.

This was an action of ejectment brought by the respondents against the appellants and defendants to recover the possession of certain real property situated in Lincoln county in this State. The action was tried by the court without a jury. The findings of fact are accepted by both sides as correct, and the cause is here on the question whether the proper judgment was entered upon the findings.

The findings of fact material to the inquiry are substantially these: The appellants are husband and wife, and acquired the land in controversy as early as the year 1885. On March 16, 1895, the respondents and one L. J. Hutchings, as partners, recovered a judgment in the superior court of Lincoln county on a community debt against the appellant, Geo. F. Laugenour, for the sum of $363.45. On April 12, 1899, execution was issued on the judgment and levied on the land mentioned, under which, after due advertisement, it was sold at public auction to the respondents for the sum of $532.15, being the amount then due on the judgment. Thereafter the sale was confirmed by the court, and after the time for redemption had expired, a sheriff's deed was executed and delivered to the purchasers, which they caused to be recorded. On May 10, 1899, three days before the execution sale took place, the appellant, Geo. F. Laugenour, filed in the United States district court for the district of Washington, his voluntary petition in bankruptcy in the schedule to which he listed the land in controversy, claiming the same as exempt under the bank-
44 ruptcy act. On May 11th, 1899, the referee in bankruptcy, to whom the proceedings had been referred, adjudged the petitioner a bankrupt, and thereupon gave to the creditors of the bankrupt, shown in the schedule attached to the petition, among whom were the respondents, the formal notice required by the bankruptcy act, notifying them of the adjudication of bankruptcy, of the time and place fixed for the first meeting of the creditors, that they might attend at such meeting, prove their claims, examine the bankrupt, and transact such other business as should properly come before the meeting. None of the creditors appeared at the time fixed for the meeting; viz., June 5, 1899, and no trustee was elected or appointed; the referee finding that no necessity existed therefor.

On August 9, 1899, the bankruptcy court entered an order discharging the bankrupt from all debts and claims made provable against the bankrupt's estate; and on August 12th. "regularly made an order in said bankruptcy proceedings setting aside to said bankrupt as exempt under the act of Congress relating to bankruptcy, the real estate hereinbefore described, and awarding said real estate to the said bankrupt." The court further found that since the execution sale the appellants had been in possession of the real estate, claiming to be the owners of the same; and for several years last past had resided in Spokane county, Washington, and that the real property, during the time, had been occupied by the defendant, Harry Gilliland, as their tenant. On the facts so found it ruled that the respondents were the owners and entitled to the possession of the premises, and entered judgment accordingly.

The respondents move to dismiss the appeal assigning as reasons therefor, (1) that the notice of appeal is insufficient; (2) that the notice of appeal given was not served on the defendants Green and Gilliland; and (3) that the appeal bond was not filed in time. The contention that the notice of appeal is insufficient is based upon the fact that it is not directed to the defendants Green and Gilliland, each of whom appeared in the action, the former by filing
45 an answer disclaiming any interest in the subject-matter of the action, and the latter by setting up a leasehold interest expiring at a fixed time. It is said that because these parties had appeared in the action, and did not join in the notice of appeal, it was necessary to serve the notice of appeal on them, and that a notice of appeal not directed to a party, whether served on him or not, is ineffectual to bring that party before the appellate court. The defendant Green, having answered disclaiming interest was neither a necessary nor a proper party to the appeal, and service of notice upon him was unnecessary. Watson *v.* Sawyer, 12 Wash. 36. The interest of the defendant Gilliland in the premises, as shown by his answer, had expired before the trial of the action, and the judgment against him was to the effect that he had no interest, and it may be seriously questioned whether it was necessary to serve him with the notice of appeal at all. But conceding that it was, we cannot agree that it was necessary that the notice be directed to him. The statute relating to notices of appeal does not in terms provide that it shall be directed to anyone. To appeal is not to institute an original proceeding, nor is the notice in any sense a summons or a writ to bring parties before the court. It is a notice and nothing more. It would seem therefore that when the notice is properly entitled as of the action in which the appeal is taken, and informs the parties to the action who the appellants are, and the judgment or part of the judgment appealed from, it complies with all the requisites of a proper notice, and consequently with the directions of the statute. But if it be said the statute implies the requirement that the notice of appeal be directed to any of the parties, it is sufficient if it be directed to the prevailing parties. Two methods of giving notice of appeal are provided by the statute. The notice may be given

orally in open court at the time the judgment or order appealed from is rendered or made, in which case the judge shall direct the clerk to make an entry of such notice in the journal of the court, or, "if the appeal be not taken when the judgment or order
46 appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, * * * serve written notice on the prevailing party or his attorney that he appeals from such judgment or order. * * *" A subsequent section provides that all parties whose interests are similarly affected may join in the motion of appeal, and that any such party who has not joined in the notice when given may do so within ten days after the notice is served on them by filing a statement to that effect with the clerk of the superior court, or may within that time serve an independent notice of appeal; further providing that when a notice of appeal is not given at the time the judgment or order appealed from is rendered or made, it shall be served on all parties who have appeared in the action. It is plain, however, that the purpose of this is not to make such parties parties to the appeal, but is for the purpose of giving them an opportunity to become such should they so desire. There can then be no implied requirement that the notice be directed to them. Here the notice was directed to the prevailing parties and we hold it sufficient as a notice of appeal.

It appears that the attorneys representing the appellants also represented the defendant Gilliland in the court below. On taking the appeal they acknowledged service of the notice thereof on themselves as attorneys for Gilliland, and it is contended that this is sufficient to show a service of the notice on that defendant. If the service was insufficient it is because the attorneys representing Gilliland in the court below were without authority to represent him on the appeal, and this want of authority must be gathered from the mere fact they are the attorneys representing the appellants. But is this fact of itself sufficient to show a want of authority? We think not. Unless there is a conflict of interest between this defendant and the appellants, the same counsel can with propriety represent the interests of both, and as the record shows no conflict of interest, it will not be presumed that any such exists.

47 The third ground of the motion is rendered pointless by the supplemental transcript sent up by the appellants. The motion to dismiss is denied.

Passing to the merits of the controversy, it is at once obvious that the correctness of the judgment of the trial court must depend upon the effect that is given to the order of the bankruptcy court setting apart to the bankrupt the property in question as property exempt from the claims of his creditors. It will be remembered that the statute of this State permits a head of a family to select from his or her real property a homestead of a limited value, and exempts the same from the liens of general judgments, and from execution or forced sales thereunder; Ballinger's Code, sec. 5214, *et seq.*; that the selection may be made at any time before sale; Wiss *v.* Stewart,

16 Wash. 376; and that an execution sale thereof after such selection is ineffectual to pass title to the purchaser. Wiss *v.* Stewart, *supra;* Asher *v.* Sekofsky, 10 Wash. 379. If therefore the property in question was exempt from execution at the time the sale was made under the execution issued on the respondents' judgment, the respondents acquired no title thereto by their purchase at the execution sale, and consequently have no title on which they can maintain the present action. Now the appellants were at liberty to establish this fact in one, or both, of two ways, they could plead and prove facts showing the property to have been exempt from execution at the time of the sale, thus making the question directly an issue in the State court, or they could plead and prove that the question had been once adjudicated between the parties in a court of competent jurisdiction, having the parties and the subject-matter before it. The appellants chose the latter method. They sought to show that the property was exempt by showing that a bankruptcy court, having jurisdiction of the person and estate of the appllants, in a proceeding in bankruptcy in which the respondents' judgment was provable, had awarded the property to the appellants as property exempt from the claims of his creditors. As this
48 order related back to the time of the institution of the bankruptcy proceedings it is *res judicata*, if it has the force of *res judicata* at all, that the property was exempt from sale at the time sale thereof was made, and hence an adjudication that the sale was void.

Why has not the order the effect of *res judicata* between the parties as to the status of the property at the time of the institution of the bankruptcy proceedings? The respondents suggest several answers, and as these involve the whole question we will discuss them in order.

It is first said that the order is invalid because it was made by the judge of the court, while *by* sec. 47, cl. 11, of the bankruptcy act makes it the duty of the trustee to "set apart the bankrupt's exemptions." The order here in consideration was made by the judge of the bankruptcy court while in the exercise of his judicial functions, and is the order of the bankruptcy court. By sec. 2, cl. 11, of the bankruptcy act the bankruptcy court is expressly vested with jurisdiction "to determine all claims of bankrupts to their exemptions," and by cl. 15 of the same section the court has jurisdiction to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of" the act. The first of these clearly confers upon the bankruptcy court power to determine what property of the bankrupt is and what is not exempt property, and the second clause just as clearly confers the power to make such orders as the court may find necessary to enable the bankrupt to become possessed of the property the act allows to him as exempt. On the other hand the duties of the trustee with reference to the bankrupt's exempt property are ministerial. While he is authorized by the act

to set aside the bankrupt's exemptions, he cannot determine disputed questions arising over the right to exemptions. Nor are his acts with relation to exemptions where there is no dispute in any sense final. He is obliged to report his doings to the court,
49 and certainly the court can and would of its own motion correct his abusive acts however the same might be called to its attention. There can be therefore, it seems to us, no question as to the power of the bankruptcy court to make an order setting apart to a bankrupt certain property as exempt.

It is next said that conceding the property to have been exempt, the title thereto would not have vested in a trustee and the bankruptcy court would have no jurisdiction over it. Aside from the fact that such a concession would seem to be fatal to the respondents' title, as the property was not subject to execution sale if exempt, we cannot think the conclusion sound. The bankrupt is obligated to schedule all of his property in his petition in bankruptcy—that which he claims as exempt as well as that to which he makes no such claim—and it is the duty of the bankrupt court to determine and set apart to him the exemptions allowed by law. Clearly the property is subjected to the jurisdiction of the court no matter in whom the legal title thereto may be said to rest. To contend differently is to contend that the court's order is a valid and binding adjudication when it decides that the property is not exempt, but a mere nullity when the decision is otherwise. However inconsistent the language of the act may be it certainly did not contemplate such an absurdity as this. The claims of the bankruptcy act vesting in the trustee the title to all the bankrupt's estate "except in so far as it is to property which is exempt," was intended, it seems to us, to do away with the necessity of a conveyance from the bankrupt to the trustee and nothing more; it was not intended to deny to the bankruptcy court the power to make valid orders with reference to all or any of the bankrupt's property, whatever may be its character, or whether the title may be in the bankrupt or the officer of the court.

Again it is said that because in this case no trustee was appointed the court was without power to make a valid order with
50 reference to the bankrupt's exempt property. What we have said in answer to the last objection would seem to answer this, but there is an additional reason why the contention is unsound. The bankruptcy act (sec. 30) expressly empowers the Supreme Court of the United States to prescribe all necessary rules for carrying the act into force and effect, and that court has by rule (XV.) empowered the bankruptcy court to direct that no trustee be appointed where the schedule of a voluntary bankrupt shows no assets, and no creditor appears at the first meeting; using the term "assets" evidently in the sense that there is no property available to the payment of the claims of the creditors, or the expenses of the trustee, not that there is absolutely no property. See, *In re* Levy, 101 Fed. 247. This rule if valid is as much a part of the bankrupt

act, as is any section or clause of that act, and unless it is to be held that the Supreme Court exceeded its powers in the announcement of the rule, it cannot be held that the appointment of a trustee is necessary in order to enable the court to make a valid order with reference to exempt property. No reason is suggested why the rule is not within the legi-mate powers of the Supreme Court, and as we perceive none, we cannot but hold the ruling of the bankruptcy court to the effect that there was no necessity for the appointment of a trustee in the proceedings in question, a valid order in no way affecting its other powers.

Again it is said that the order setting apart the property as exempt was made without notice to the respondents and hence has no force as against them. To this it is a sufficient answer to say that the record does not bear out the fact here assumed. The trial court found that this order was "regularly made," which presumes that all of the necessary steps were taken to give it validity if it was within the power of the court to make it.

Lastly it is said that the order of the court setting apart the property as exempt does not purport to, nor does it in law affect existing liens upon the property set apart as exempt, and unless the
51 liens thereon be such as the law avoids of its own force, such liens may be enforced in the State court against and to the extent of the property affected by the lien, notwithstanding the order setting it apart as exempt and the discharge of the debt in bankruptcy. In cases of liens which can exist independent of the question whether or not the property is exempt, undoubtedly the rule here invoked would be applicable, but the lien of a general judgment is not such a lien. It is a lien upon real property only which is not exempt. Hence, if this property was exempt at the time of the filing of the petition in bankruptcy, the judgment under which it was sold was not a lien thereon, and to assume that the judgment was a lien is to assume that it was not exempt—the very question at issue. It must be borne in mind that the order of the bankruptcy court related back to the time of the filing of the petition in bankruptcy, and is a judgment of that court that the property was exempt at that time, and is, in its effect, a judgment that the respondents' judgment was not a lien on it. This being so, it cannot be said that it was set apart subject to a lien, or that the question whether the judgment of the respondents was or was not a lien on it was left open to investigation in the State courts.

The conclusion must follow, therefore, that the order of the bankruptcy court was an order of a court of competent jurisdiction, having the parties and the subject-matter before it. As such it is conclusive between the parties of the question decided. This question was that the real property in dispute was exempt from execution at the time the respondents attempted to sell it upon their judgment. The sale was for that reason void, and the appellants entitled to the judgment prayed for in their answer.

The judgment is reversed and the cause remanded with instruc-

tions to enter a judgment for the appellants in accordance
52 with the prayer of the answer.

FULLERTON, *J.*

We concur:
REAVIS, *C. J.*
MOUNT, *J.*
ANDERS, *J.*
DUNBAR, *J.*

53 In the Supreme Court of the State of Washington.

A. L. SMALLEY and F. MCLELLAN, Respondents,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, Appellants, and John F. Green and Harry Gilliland, Defendants.

No. 4241. Petition for Re-hearing.

Come now A. L. Smalley and F. McLellan, the respondents herein, and present to this honorable court, the following, as their petition for a re-hearing herein:—

1. An examination of the opinion filed in this case, will at once disclose that the decision of this court in appellants' favor is based entirely upon the order made by Judge Hanford on August 12, 1899, setting aside to appellant Laugenour as exempt, under the act of Congress relating to bankruptcy, the real estate in question. In other words it is held by this court, as we read the decision, that the aforesaid order of Judge Hanford, has the effect of *res adjudicata*, as between appellants and respondents. This court concludes that a judge of the bankruptcy court has power, and can set aside exemptions without any action on the part of the trustee, notwithstanding the express provision in the act that the trustee "shall * * * set apart the bankrupt's exemptions and report the items and estimated value thereof to the court * * *" Section 47, cl. 11.

It is said in the opinion that sec. 2 cl. 11 "confers upon the bankruptcy court power to determine what property of the bank-
54 rupt is, and what is not, exempt property * * *." We do not of course deny that the judge of the bankruptcy court, has power to finally determine what property is exempt, but does that fact make the report and estimate of the trustee unnecessary? It seems to us that Congress intended that there should be an exemption and report of the property by the trustee as a prerequisite, to the court's acting upon exemptions claimed. As we construe the authority in the act, "to determine all claims of bankrupts to their exemptions," means simply that the court is to determine all such claims when properly before it for determination, that is when the trustee has filed his report of the items claimed as exempt and the estimated value thereof, and some objection is made to the property

set apart. It seems clear that the trustee must act. In Brandenburg on Bankruptcy (late edition) p. 129, it is said: "As to what constitutes the setting aside of the exemption, it seems clear that some affirmative act to that end is required of the trustee."

Again, respondents certainly have lost no rights because of the fact that the exemptions were set aside by Judge Hanford instead of a trustee. Now suppose the exemptions had been set aside by a trustee; his duties with reference to the bankrupt's exempt property, being ministerial as held by this court, can it be said that the matter of Laugenour's right to the exemptions claimed has been adjudicated, so far as respondents are concerned?

It is clear, in uncontested cases at least, that the trustee alone sets aside exemptions, and no act of the court is necessary. The act does not provide for any hearing before the trustee as to exemptions. Can it be said that this ministerial act on the part of the trustee, without any provision for notice to interested parties or any hearing whatsoever before him, can take the place of the solemn judgment of a court of competent jurisdiction? But we submit that Judge Hanford's order is of no more force than the doings of the trustee as to exemptions.

It is true that by rule 15 of the supreme court, no trustee is necessary, where the schedules disclose no assets and no creditors appear at the first meeting. Of course if the schedule of the bankrupt shows no assets, that is, nothing to be administered, then the trustee would have nothing whatever to do and his appointment would be a vain thing.

This court however construes rule XV. to mean that the appointment of a trustee may be dispensed with when the schedule discloses no assets available to creditors. In other words, all a bankrupt need do, if he does not want a trustee, is to *claim* every thing in sight as exempt, even though the property is actually worth many thousand dollars, above his exemption, as in the case at bar. Then, if no creditors appear at the first meeting, no trustee is appointed. But it seems to us that rule XV means that a trustee can be dispensed with only in cases where there is no property whatsoever. To hold otherwise would virtually be to hold that the bankrupt himself determines whether he will have a trustee or not. If this is the proper construction, then Judge Hanford had no jurisdiction whatsoever to set aside the exemptions, as this was the sole duty of the trustee.

2. Respondents contend in their brief, and now contend, that conceding the property to have been exempt, the title thereto would not have vested in the trustee. The opinion suggests that "such a concession would seem to be fatal to respondents' title, as the property was not subject to execution, if exempt." We see nothing fatal in the concession. The fact that property is exempt, does not necessarily free it from the assaults of creditors, unless the exemption is claimed by the debtor. Even though the property in question was actually exempt, respondents' title thereto would still be good, unless the exemptions were claimed.

56 Dry Goods Co. *vs.* Nelson, 88 N. W. 703 cited in respondents' brief but not mentioned in the opinion herein, is a strong case for respondents. (This authority with some others was inserted in the brief with a pen and was probably overlooked by the court.) The fact is that neither party to this appeal took up much time with the order setting the property aside as exempt, it was not discussed at length. Both parties assumed that the case would be decided by sec. 67*f* of the act, to which this court makes no reference.)

In the Nelson case the defendant's property was attached; afterwards he was adjudged a bankrupt by the United States district court for North Dakota, and the property was set apart to the bankrupt as exempt, by express order of the court. Notwithstanding this, the attachment was sustained and the property ordered sold; the setting aside of the exemptions and the discharge of the bankrupt did not affect the right of the creditor, whose claim was included in the schedule, as in the case at bar. And this holding was affirmed by the supreme court of North Dakota. It is of no importance that a second attachment was issued in that case, because the first attachment was made within four months of the adjudication. In the case at bar the lien was created in 1895. In the Nelson case the court among other things says: "Exempt property constitutes no part of the estate which passes to the trustee for the benefit of creditors. As before stated, under the plain policy of the bankruptcy act, as well as by its specific provisions, exempt property is not disturbed, but is left to the debtor, to be held by him subject to the laws of the State, entirely freed from Federal interference. If defendant's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; thus entirely de-
57 stroying the debtor's right to save the exemptions allowed by the laws of the State from the reach of general creditors. No such absurd construction can be sustained. In this case the bankruptcy court had by an express order set apart the property levied upon before the attachment was levied. By that order is disclaimed further jurisdiction, even for the purpose of inventory and appraisement. Upon this state of facts, it seems clear the discharge in bankruptcy was without effect upon the lien theretofore created under the laws of this State upon property which was then subject exclusively to the jurisdiction of the State courts. As sustaining our views, see the very recent case of *In re* Little (D. C.) 110 Fed., 621."

In view of the brief discussion of the question of exemption, in the briefs, and the importance of the case, and for the sake of justice, we beg of the court to examine the Nelson case at 88 N. W. p. 703, and especially pages 705–6.

"In Robinson *v.* Wilson, 15 Kan. 595, an attachment was levied on land claimed as a homestead within four months prior to the adjudication in bankruptcy. It was held that the homestead did not pass to the assignee in bankruptcy, and that the bankruptcy

proceedings did not dissolve the attachment. In the course of its opinion the court said that 'as the bankrupt court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property.'"

"In Thole *v.* Watson 6 Mo. App. 591 it was held that 'where household furniture attached is claimed as exempt by the bankrupt, and set apart to him as exempt by the assignee, it does not pass to the assignee, and is subject to the process of the State courts.'"

3. The act provides that the trustee shall "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court.

Sec. 47 cl. 11.

58 It may be and doubtless is true, that the judge may in contested cases decide upon the right to exemptions claimed, yet it is also true that the mere setting aside of the exempt property by the trustee and his report thereon, constitute the setting aside of exempt property without any action on the part of the Federal judge. In other words the setting aside of exemptions is a mere ministerial act on the part of the trustee. This being true, the nature of the act of setting aside exemptions, as it seems to us, is not changed because the duties of the trustee in this regard are performed by the judge.

If it is a ministerial act, it can scarcely be said that the matter has been adjudicated, before a court of competent jurisdiction.

4. The order of Judge Hanford is not binding upon respondents because made without notice to them. It is not claimed in the complaint, nor was it claimed in the lower court, nor in this court, that any notice of the setting aside of this property as exempt, nor indeed of any of the proceedings in bankruptcy was given respondents save and except the notice of the first meeting of creditors. This notice the lower court finds was given to respondents, but as to any other notice to respondents, the record is dolefully silent.

It is true the court finds that the order setting aside the property was "regularly made."

The finding of the lower court that Judge Hanford "regularly made an order etc." is a mere conclusion. It cannot be assumed that the lower court had before it sufficient facts to justify this conclusion, for *all* the facts before the court, are now before this court; the findings of fact are all in the record, and we submit that no fact in the record will justify the conclusion made by the court that the "order" was regularly made. That fact that the court put
59 this among the findings of fact instead of a conclusion will not change the character. There is absolutely no finding of the lower court, showing jurisdiction to set aside the exemption, except the finding as to the filing of the petition in bankruptcy, and notice of the first meeting of creditors mailed to respondents; but these two findings were wholly insufficient under sec. 58 (*a*) of the act.

Besides it has been held that the allegations that some act of a

court was "duly" performed was not equivalent to an allegation of jurisdictional facts.

Ladbroke *vs.* James Willes, 199.
Mills *vs.* Martin, 19 Johns. 7.
Cleveland *vs.* Rogers, 6 Wend. 438.

In Ladbroke *vs.* James, *supra*, defendant pleaded that he was "duly discharged," but it was held bad because jurisdictional facts were not alleged.

The fact that appellants alleged notice of the first meeting of creditors, but did not allege any other notice, ought to weigh for much more than the apparently inadvertant use by the lower court of the word "regularly" in connection with the making of the order. Besides the bankruptcy court is limited in the jurisdiction, and therefore jurisdiction to act should be affirmatively shown.

Now in the case at bar, there was no trustee and hence the court was not advised by a report of the "items and estimated value" of the property claimed as exempt. There were no creditors, who filed claims so far as the record shows.

Hence the only way the court could be advised as to the value of the property claimed as exempt, would be by an examination of the bankrupt himself.

This being true the respondents were entitled to notice of this examination, even though they did not appear at the first meeting of creditors, and the court had no jurisdiction to act without such notice.

60 Sec. 58 of the act provides:

"Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt;"

The respondents were named as creditors in the bankrupt's schedule, and hence under the express provisions of sec. 58 they were entitled to "*at least ten days' notice by mail*" of "*all examinations of the bankrupt.*"

It is perfectly natural therefore that respondents should feel aggrieved at a judgment of this court holding that they have "had their day in court" as to this real estate being exempt, when they had no sort of knowledge thereof until the answer was filed in the lower court.

It will be observed that the service and publication of the first notice, that is the notice of first meeting of creditors, does not give jurisdiction to the court to proceed generally with the bankrupt proceedings.

"All examinations of the bankrupt," can be had only, after the required notice has been given.

The bankruptcy court being a court of limited jurisdiction, and the service of the 10 days' notice being necessary to give the court jurisdiction to proceed, it was incumbent upon appellants to show

in the lower court that this notice had actually been given to respondents.

Appellants at page 26 of their opening brief say that "respondents were parties to that proce-ding, as is clearly shown by the findings to the effect that they were notified." As the findings only refer to the first notice to creditors, and not to any hearing upon
61 exemptions claimed, it is clearly apparent that the only notice which appellants claim was given, was the first notice to creditors. It is therefore clear that appellants virtually concede that no other notice was given. The appellants have never made mention of any other notice, neither did the lower court make any finding in that regard.

With all due respect to this court we think that respondents have never "had their day in court" as to this property being exempt from execution.

It is said in the opinion of this court commencing at the bottom of page 5: "As this order related back to the time of the institution of the bankruptcy proceedings it is *res judicata*, if it has the force of *res judicata* at all, that the property was exempt from sale at the time sale thereof was made, and hence an adjudication that the sale was void."

We have carefully examined the entire bankruptcy act of 1898, and have been unable after a diligent search to find any thing in the act supporting the statement in the opinion that the order of Judge Hanford setting aside the property as exempt on August 12, 1899, "related back to the time of the institution of bankruptcy proceedings."

With all due respect to this court it seems to us that the writer of the opinion while writing the above had in mind sec. 70 of the act which provides in substance that the trustee upon his appointment and qualification is vested by operation of law with the title of all property of the bankrupt, *as of the date he was adjudged a bankrupt*, unless such property is exempt. But under the plain provisions of the act itself as well as *all* the authorities on the subject, exempt property is excepted from the provisions of said sec. 70. (See Cyc. of Law and Proc. pages 342 and 344 and notes.)

The sheriff's sale was had May 13, 1899. The order of Judge Hanford was made August 12. If the order of Judge Hanford did not relate back to the commencement of the bankruptcy pro-
62 ceeding, then it could not affect the status of the property on May 13th when the respondents purchased the same. It may be claimed that Laugenour had a right to have his exemption set aside in the bankruptcy court, but this would not give him a right to exemption in property that he did not own at the time the exemptions were attempted to be set aside.

We urge upon the court a careful examination of the authorities and contentions made in this petition not only because of the importance of the question involved under the provisions of a recent Federal law, but also on account of the fact that the property is of value many thousand dollars above the exemptions, allowed by law.

In conclusion it seems to us for the reasons herein mentioned, the principle of *res adjudicata* can not and should not apply in this case; and we respectfully ask that our petition herein be granted, and that the lower court's judgment be affirmed.

Respectfully submitted,

MYERS & WARREN,
Attorneys for Respondents.

Davenport, Washington, December 5, 1902.

Endorsement: No. 4241. In the supreme court of the State of Washington. Smalley, *et al.*, appellants, *vs.* Laugenour *et al.*, respondents. Petition for re-hearing. Filed Dec. 8, 1902. C. S. Reinhart, clerk. F. S. Guyot, dep.

63

A. L. SMALLEY and F. McLELLAN, Respondents, *v.* GEORGE F. LAUGENOUR & JANE LAUGENOUR, Appellants; John F. Green *et al.*, Defendants.	No. 4241. Judgment.

This cause having been heretofore submitted to the court, upon the transcript of the record of the superior court of Lincoln county and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 10th. day of January, A. D. 1903, on motion of Crow & Williams, of counsel for appellant, considered, adjudged, and decreed, that the judgment of the said superior court be, and the same is, hereby reversed with costs; the petition for rehearing denied, and that the said George F. Laugenour *et al.* have and recover of and from the said A. L. Smalley and F. McLellan the costs of this action taxed and allowed at seventy-nine & $\frac{20}{100}$ dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

64 In the Supreme Court of the State of Washington.

A. L. SMALLEY and F. McLELLAN, Respondents, *vs.* GEORGE F. LAUGENOUR and JANE LAUGENOUR, Appellants; John F. Green and Harry Gilliland, Defendants.	No. —. Petition for Writ of Error.

To the honorable judges of the supreme court of the State of Washington:

Your petitioners, the above named A. L. Smalley and F. McLellan, plaintiffs and respondents in the above entitled cause, feeling

themselves aggrieved by the judgment of this court heretofore entered on the 12th day of November, 1902, do hereby petition this honorable court for an order allowing said respondents and plaintiffs A. L. Smalley and F. McLellan to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said plaintiffs and respondents A. L. Smalley and F. McLellan shall give and furnished upon said writ of error.

The errors committed to the prejudice of these respondents and plaintiffs A. L. Smalley and F. McLellan will more fully and in detail appear from the assignment of errors which is filed with this petition, and referred to as a part hereof.

And your petitioners will ever pray.

VOORHEES & VOORHEES AND
MYERS & WARREN.
Attorneys for Petitioners.

65 STATE OF WASHINGTON:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, bond to be given for costs in the sum of $500.00.

In testimony whereof witness my hand this 5th day of June 1903.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

Endorsement: 4241. In the Supreme Court of the United States. A. L. Smalley and F. McLellan, plaintiffs in error, *vs.* George F. Laugenour and Jane Laugenour, John F. Green and Harry Gilliland, defendants in error. Petition for writ of error. Filed Jun 5 1903. C. S. Reinhart, clerk.

66 In the Supreme Court of the United States.

A. L. SMALLEY and F. MCLELLAN, Plaintiffs in Error,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, John F. Green, and Harry Gilliland, Defendants in Error.
} Assignment of Errors.

The above named plaintiffs in error A. L. Smalley and F. McLellan, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon the trial of this cause in the supreme court of the State of Washington, to-wit:

I.

The court erred in holding that under the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 U. S. Stats. at Large, p. 544) it was not necessary for the trustee to "set apart the bankrupt's exemptions" as a pre-requisite to the making of a valid order by the bankruptcy court determining the claims of the bankrupt to his exemptions under said act of Congress.

II.

The court erred in holding that the court of bankruptcy, under said act of Congress, had power to make a valid order setting apart as exempt certain of the bankrupt's property without the prerequisite of the appointment of a trustee under said act.

III.

The court erred in holding that the court of bankruptcy had jurisdiction under the said act of Congress to adjudicate in a summary manner as to the validity or existence of a lien claimed to
67 have accrued upon the real property of the bankrupt more than four months prior to the filing of the petition in bankruptcy under the said act of Congress.

IV.

The court erred in holding that after the process of the State court had attached to the real property of the bankrupt and it was in course of being sold under such process, the order of the bankruptcy court under said act of Congress, setting aside such property as exempt, operated, without any stay or injunction being imposed upon the action of the State court or its procees or the sale in progress, to interfere with the action of the State court or its process in that regard, and invalidated the sale of said property had under such process of the State court.

V.

The court erred in holding that the order of the bankruptcy court under the said act of Congress setting apart as exempt the said real property to the bankrupt, made subsequent to the sale under the process of the State court of the said property, so subsequently set apart, related back to the date of the filing of the petition in bankruptcy so as to take effect prior to said sale and invalidate the same.

VI.

The court erred in holding that the said order by the bankruptcy court under the said act of Congress setting aside as exempt the said real property to the bankrupt, adjudicated, as between the bankrupt

and the said A. L. Smalley and F. McLellan, the fact of the exempt character of the said property so as to make the sale under the process of the State court of said property upon a lien of a judgment thereon, said sale occurring prior to said order by the bankruptcy court, invalid and void.

68 VII.

The court erred in holding that the said order of the bankruptcy court under the said act of Congress setting apart as exempt the said real property to the bankrupt was *res adjudicata* as between the said bankrupt and the said A. L. Smalley and F. McLellan as to the exempt character of the said real property, with regard to the lien of the judgment had thereon by the said A. L. Smalley and the said F. McLellan.

VIII.

The court erred in holding that at the time of the making of the said order by the bankruptcy court setting aside the said real property as exempt the said real property was within the jurisdiction of the said bankruptcy court.

IX.

The court erred in giving judgment against the said A. L. Smalley and F. McLellan.

X.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress, to-wit: "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 U. S. Stats. at Large, p. 544) to have the validity or invalidity of the sale of the bankrupts' real property under the process of the State court, adjudicated in the State court uninfluenced by the order of the bankruptcy court setting said property aside as exempt.

XI.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress known as the bankruptcy act, to-wit: the act entitled "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30
69 U. S. Stats. at Large, p. 544) to have the lien claimed and had by them upon the bankrupts' real property before four months prior to the filing of the petition in bankruptcy, adjudicated by the State court together with every fact tending to establish the validity or invalidity of said lien.

Wherefore, because of said errors, the said A. L. Smalley and F. McLellan pray for a reversal.

VOORHEES & VOORHEES &
MYERS & WARREN,
Attorneys for Plaintiffs in Error.

Endorsement: 4241. In the Supreme Court of the United States. A. L. Smalley and F. McLellan, plaintiffs in error, *vs.* George F. Laugenour and Jane Laugenour, John F. Green and Harry Gilliland, defendants in error. Assignment of errors. Filed Jun- 5 1903 C. S. Reinhart clerk.

70 In the Supreme Court of the State of Washington.

A. L. SMALLEY and F. MCLELLAN, Respondents,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR, Appellants; John F. Green, and Harry Gilliland, Defendants.
} Bond on Writ of Error.

Know all men by these presents that we, A. L. Smalley and F. McLellan, as principals, and L. C. Fisher and Geo. E. Smith as sureties, are held and firmly bound unto the said George F. Laugenour and Jane Laugenour in the full and just sum of five hundred dollars ($500.00) to be paid to the said George F. Laugenour and Jane Laugenour, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 6th. day of June, 1903, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a supreme court of the State of Washington in a suit pending in said court between the said A. L. Smalley and F. McLellan, respondents and plaintiffs, and George F. Laugenour and Jane Laugenour, appellants and defendants, and John F.
71 Green and Harry Gilliland, defendants, a judgment was rendered against the said A. L. Smalley and F. McLellan, and the said A. L. Smalley and F. McLellan having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George F. Laugenour and Jane Laugenour, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 7th day of August, 1903.

Now, the condition of the above obligation is such that if the said A. L. Smalley and F. McLellan shall prosecute said writ of error to effect and answer all costs if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

A. L. SMALLEY, [SEAL.]
By H. A. P. MYERS,
One of His Attorneys.
F. McLELLAN, [SEAL.]
By H. A. P. MYERS,
One of His Attorneys.
L. C. FISHER. [SEAL.]
GEO. E. SMITH. [SEAL.]

Sealed and delivered in the presence of—
GEO. M. RYKER.
J. H. REID.

72 STATE OF WASHINGTON, } ss:
County of Lincoln, }

L. C. Fisher and Geo. E. Smith, being first duly severally sworn deposes and says, each for himself and not for the other: I am one of the sureties who signed the above and foregoing bond; I am a resident of Lincoln county, State of Washington, and am worth the sum of five hundred dollars in separate property in the said State of Washington over and above all debts and liabilities and exclusive of property exempt from execution.

L. C. FISHER.
GEO. E. SMITH.

Severally subscribed and sworn to before me this 6 day of June, 1903.

GEO. M. RYKER,
Notary Public, Residing at Sprague, Washington.

The foregoing bond both as to form and sufficiency is hereby approved this 8th day of June, 1903.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington, Being the Highest Court in said State.

Endorsement: 4241. In the Supreme Court of the United States. A. L. Smalley and F. McLellan, respondents, *v.* George F. Laugenour and Jane Laugenour, appellants, John F. Green and Harry Gilliland, defendants. Bond on writ of error. Filed Jun- 9 1903 C. S. Reinhart, clerk.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said supreme court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. L. Smalley and F. McLellan, respondents (plaintiffs in error), *vs.* George F. Laugenour and Jane Laugenour, appellants, and John F. Green and Harry Gilliland, defendants (defendants in error), wherein was drawn in question the validity of a treaty or statute of, or authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in ques-

tion the construction of a clause of the Constitution of, or treaty of, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty or statute or commission, a manifest error hath happened, to the great damage of the said A. L. Smalley and F. McLellan, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on
74 the 7th day of August 1903, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of June in the year of our Lord one thousand nine hundred and three and of the Independence of the United States — one hundred and twenty-seventh.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By —— ——, *Deputy Clerk.*

The above writ of error is hereby allowed.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

75 [Endorsed:] 4241. In the Supreme Court of the United States. A. L. Smalley and F. McLellan plaintiffs in error *vs.* George F. Laugenour and Jane Laugenour, John F. Green and Harry Gilliland defendants in error. Writ of error. Filed Jun- 8 1903 C. S. Reinhart clerk.

76 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To George F. Laugenour and Jane Laugenour, defendants in error, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington in the District of Columbia, on or before the seventh day of August, 1903, pursuant to a writ of error filed in the clerk's office of the

supreme court of the State of Washington, wherein A. L. Smalley and F. McLellan are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court, State of Washington.]

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

Attest: C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Service of the above and foregoing citation is hereby admitted on this 12" day of June, 1903

CROW & WILLIAMS,
Att'ys for Def'ts in Error, Geo. Laugenour & Wife.

77 STATE OF WASHINGTON, } *ss:*
County of Spokane, }

SHERIFF'S OFFICE.

I, W. J. Doust, sheriff of Spokane county, State of Washington, do hereby certify, that I received the attached citation on the 22d day of June, 1903; and that on the 24th day of June, A. D. 1903, I duly and personally served the attached citation upon the within named defendants in error, George F. Laugenour and Jane Laugenour, his wife, in Spokane county, State of Washington, by then and there personally delivering to and leaving with the said George F. Laugenour and Jane Laugenour and each of them, true and correct copies of the original attached citation both and each of which were duly certified to be such true copies by C. S. Reinhart, clerk of the supreme court of the State of Washington.

Given under my hand this 24th day of June, A. D. 1903.

W. J. DOUST,
Sheriff of Spokane Co., Washington.

Fees.

Mileage: — miles..... $160
Service to defendants.....

Total.....

Affidavit of Service.

STATE OF WASHINGTON, } ss:
County of Spokane, }

W. J. Doust, being first duly sworn deposes and says that during all the times herein mentioned he was a citizen of the State of Washington and over the age of twenty-one years, and competent to be a witness in the within entitled cause; that on the 24th day of June, A. D. 1903, affiant duly served the attached citation upon the within named defendants in error, George F. Laugenour and Jane Laugenour, in Spokane county, State of Washington, by then and there personally delivering to and leaving with said George F. Laugenour and Jane Laugenour, and each of them, true and correct copies of the original attached citation, both and each of which were duly certified to be such said copies by C. S. Reinhart, clerk of the supreme court of the State of Washington.

W. J. DOUST.

Subscribed and sworn to before me this 24th day of June, 1903.

{ Seal of Geo. H. Wallis, Notary Public, State of Washington. Commission expires April 5, 1905. }

GEO. H. WALLIS,
Sp. Notary Public, Residing at Spokane, Washington.

78 [Endorsed:] 4241 In the Supreme Court of the United States. A. L. Smalley and F. McLellan, plaintiffs in error, *v.* George F. Laugenour and Jane Laugenour, John F. Green and Harry Gilliland, defendants in error. Citation. Filed Jul- 14 1903 C. S. Reinhart clerk. F. S. Guyot dep.

79 In the Supreme Court of the State of Washington.

A. L. SMALLEY and F. MCLELLAN, Respondents, *v.* GEORGE F. LAUGENOUR and JANE LAUGENOUR, Appellants; JOHN F. GREEN, and HARRY GILLILAND, Defendants.	No. 4241. Certificate of Clerk of Supreme Court, State of Washington.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause; that in pursuance of the writ of error heretofore filed, I herewith transmit the same, together with the original writ of error and the original citation, to the Supreme Court of the United States. And I

further certify that there has been deposited in my office, for the use of the defendant- in error, a copy of the writ of error filed herein.

And I also hereby certify that I have attached hereto a copy of the original opinion filed by the supreme court of the State of Washington, in the above cause; and also a copy of the original assignment of errors filed in this court by the plaintiffs in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court at Olympia, this 16th day of July, 1903.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 19,035. Washington supreme court. Term No. 384. A. L. Smalley and F. McLellan, plaintiffs in error, *vs.* George F. Laugenour and Jane Laugenour. Filed July 30th, 1903. File No. 19,035.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

A. L. SMALLEY AND F. McLELLAN,
Plaintiffs in Error,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR,
Defendants in Error.
No. 384.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFFS IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This is a suit in ejectment brought by the plaintiffs in error against the defendants in error to recover possession of certain real property. Plaintiffs in error assert title under the lien of a judgment gotten by plaintiffs in error and another, against George F. Laugenour, one of the defendants in error, and the resulting sale of said land upon execution to satisfy said lien, the land being bought in by the plaintiffs in error at such sale (Trans., pp. 10, 11). The said judgment was entered on March 16th, 1895, from which date the lien accrued (Findings 3, 11, trans., pp. 10, 11, 3-5). Upon April

12th, 1899, an execution was issued out of the state court upon the said property and levied thereon by the sheriff upon said last named date, and thereafter, to-wit: on May 13, 1899, the said land was sold by the sheriff under said execution so levied, and was bought in by the plaintiffs in error. On May 27th, 1899, the state court duly made its order confirming said sale and declaring it valid (Trans., p. 11).

The defense, material here, set up by defendants in error, was that on May 10, 1899, over four years after the accrual of the said lien and about a month after the levy of the execution on the property, defendant George F. Laugenour filed a petition in bankruptcy, and thereafter, to-wit: on the 11th day of May, 1899, was adjudged a bankrupt. That, on August 9, 1899, the United States District Court, as a court of bankruptcy, discharged said George F. Laugenour as a bankrupt and that, on the 12th day of August, 1899, the said court made an order, in the bankruptcy proceeding, setting aside the said property involved in the ejectment suit as exempt and awarding it to the said bankrupt (Trans., pp. 6, 12).

The trial court awarded the land, in the ejectment proceeding, to the plaintiffs in error, and on appeal the state supreme court reversed the court below and awarded the land to the defendants in error (Trans., pp. 23-29). The decision of the state supreme court rested entirely upon a construction of the act of Conress of July 1, 1898 (30 *U. S. Stats. at Large*, 544) to the effect that the bankruptcy court had jurisdiction of the property, and had passed upon the re-

spective rights of the plaintiffs and defendants in error, and had decided against the plaintiffs in error, and that said decision was *res adjudicata.*

"Passing to the merits of the controversy it is at once "obvious that the correctness of the judgment of the "trial court must depend upon the effect that is given "to the order of the bankruptcy court setting apart to "the bankrupt the property in question as property "exempt from the claims of his creditors." (Opinion state supreme court, trans., p. 25.)

ASSIGNMENT OF ERRORS.

(Trans., pp. 37-38.)

I.

The court erred in holding that under the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544) it was not necessary for the trustee to "set apart the bankrupt's exemptions" as a pre-requisite to the making of a valid order by the bankruptcy court determining the claims of the bankrupt to his exemptions under said act of Congress.

II.

The court erred in holding that the court of bankruptcy, under said act of Congress, had power to make a valid order setting apart as exempt certain of the bankrupt's property without the pre-requisite of the appointment of a trustee under said act.

III.

The court erred in holding that the court of bankruptcy had jurisdiction under the said act of Congress to adjudicate in a summary manner as to the validity or existence of a lien claimed to have accrued upon the real property of the bankrupt more than four months prior to the filing of the petition in bankruptcy under the said act of Congress.

IV.

The court erred in holding that after the procees of the state court had attached to the real property of the bankrupt and it was in course of being sold under such process, the order of the bankruptcy court under said act of Congress setting aside such property as exempt, operated without any stay or injunction being imposed upon the action of the state court or its process or the sale in progress, to interfere with the action of the state court or its process in that regard, and invalidated the sale of said property had under such process of the state court.

V.

The court erred in holding that the order of the bankruptcy court under the said act of Congress setting apart as exempt the said real property to the bankrupt, made subsequent to the sale under the process of the state court of the said property, so subsequently set apart, related back to the date of the filing of the petition in bankruptcy so as to take effect prior to said sale and invalidate the same.

VI.

The court erred in holding that the said order by the bankruptcy court under the said act of Congress setting aside as exempt the said real property to the bankrupt, adjudicated, as between the bankrupt and the said A. L.

Smalley and F. McLellan, the fact of the exempt character of the said property so as to make the sale under the process of the state court of said property upon a lien of a judgment thereon, said sale occurring prior to said order by the bankruptcy court, invalid and void.

VII.

The court erred in holding that the said order of the bankruptcy court, under the said act of Congress setting apart as exempt the said real property to the bankrupt was *res adjudicata* as between the said bankrupt and the said A. L. Smalley and F. McLellan as to exempt character of the said real property, with regard to the lien of the judgment had thereon by the said A. L. Smalley and the said F. McLellan.

VIII.

The court erred in holding that at the time of the making of the said order by the bankruptcy court setting aside the said real property as exempt the said real property was within the jurisdiction of the said bankruptcy court.

IX.

The court erred in giving judgment against the said A. L. Smalley and F. McLellan.

X.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress, to-wit: "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), to have the validity or invalidity of the sale of the bankrupt's real property under the process of the state court, adjudicated in the

state court uninfluenced by the order of the bankruptcy court setting said property aside as exempt.

XI.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said Act of Congress known as the bankruptcy act, to-wit: the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), to have the lien claimed and had by them upon the bankrupt's real property before four months prior to the filing of the petition in bankruptcy, adjudicated by the state court together with every fact tending to establish the validity or invalidity of said lien.

BRIEF.

THE MERITS.

I.

The entry of the judgment gave to the plaintiffs in error a lien upon the land in controversy.

"The real estate of any judgment debtor and such as "he may acquire, shall be held and bound to satisfy any "judgment of the district or circuit court of the United "States, if rendered in this state, or of the superior or "supreme court, or any judgment of a justice of the "peace for the period of five years from the day on "which said judgment was rendered, and such judgment "shall be a lien thereupon to commence as follows: "Judgments of the superior court of the county in which

"real estate of the judgment debtor is situated, from the "date of the entry thereof; judgments of the district or "circuit courts of the United States, if rendered in this "state; judgments of the supreme court; judgments of "the superior court of any county other than the county "in which said judgment was rendered, and judgments "of a justice of the peace, from the time of the filing "and indexing of a duly certified transcript or abstract "of such judgments, as provided by this chapter, with "the county clerk of the county in which said real "estate is situated."

2 *Ballinger's Annotated Codes & Statutes of Washington*, § 5132.

The lien attached at the time of entry of the judgment, not at the time of the levy of the execution.

Mayer v. Morgan, 26 Wash., 71.

The jurisdiction of the bankruptcy courts has been always strictly construed with the view of restricting interference with the jurisdiction of the state courts.

Bardes v. First National Bank, 178 U. S., 524.

If the lien had been a mortgage, or there had been an interest claimed in the land under a disputed deed, it can hardly be said that the summary order of the court, declaring the property exempt, adjudicated such conflicting adverse claims therein. Nor from the nature of the case does it logically follow that the court intended to adjudicate any interest claimed in the land. The

action of the court was an "order in said bankruptcy proceedings," not a *judgment* in a plenary suit (Finding 16, trans., p. 12). It is entirely consistent with the terms of the order that any lien actually existing prior to the date on which the order was made, was left unaffected by such order. As to all debts sought to be enforced against the bankrupt in the bankruptcy proceedings, and as between the trustee and bankrupt, the order can properly operate (30 *U. S. Stats. at Large*, 565, § 70). As to all interests in the land claimed by persons not taking advantage of the bankruptcy proceedings, it can not properly operate. All creditors asking protection from the bankruptcy court are protected; they lose nothing by the bankrupt taking for his exemptions a mortgaged piece of land, or a piece of land a part of which a third person owns. If the bankrupt desires to take for his exemptions a piece of land so burdened, it is his privilege. The exempt character of the property, so far as this interest born of the lien and the title under the sale was concerned, was left to be determined by the state court. The mere act of the court in setting the property aside as exempt did not affect the interest had in the land by plaintiffs in error at the filing of the petition in bankruptcy.

Lockwood v. Exchange Bank, 190 U. S., 294.
White v. Thompson, 119 Fed., 868.
In re Hunt, Fed. Cas., 6883.
In re Little, 110 Fed., 621.
In re Gibbs, 109 Fed., 627; s. c., 103 Fed., 782.
In re Dunavant, 96 Fed., 542.

Plaintiffs in error lost no right by failing to prove their debt.

Yeatman v. New Orleans Sav. Inst., 95 U. S., 764.

If the order awarding the exemptions is *res adjudicata* as to the rights of plaintiffs in error, it is because the bankruptcy court took jurisdiction of such rights and passed upon them. No cause of action was set up and no special relief was asked against plaintiffs in error. They were merely notified to present their claims (Findings 5, 6, trans., p. 6). The bankruptcy court did not have jurisdiction, in a summary proceeding, of the adverse interest in the property had by plaintiffs in error. Their adverse rights in the property could be extinguished only in a plenary suit.

"So far as this view rested on the contention that, as "Comingor was joined with the bankrupts in the peti- "tion for adjudication, he therefore continued to be sub- "ject to the orders of the court without other process, we "agree with the circuit court of appeals that it cannot "be sustained.. As we understand the record, the peti- "tion in bankruptcy set up no cause of action and prayed "no special relief against Comingor, and he was appar- "ently made a defendant because adjudication would put "an end to further action by him as assignee. Clearly, as "the circuit court of appeals points out, it would be in- "admissible to permit creditors to deprive an assignee of "his right to have his claims adjudicated by the proper "court and in the customary mode of proceeding, by the "device of making him a party to the petition for an ad-

"judication and so attempting to bring him into the case "for all purposes. Nor in this matter was any petition "by the trustee, or by any other person, filed against "Comingor to recover these sums, and the orders were "entered by the referee on the record as it stood, so that "there was no pretense whatever of a plenary suit in "that court, in form or in substance.

"The proceeding was purely summary. The de- "termination of the merits on the facts was not open to "revision by appeal or writ of error under the bankrupt "law. If Comingor had been entitled to a trial by jury, "he could not have obtained it as of right. The collection "of the amounts found due would be enforceable, not by "execution, but by commitment.

"'We think that it could not have been the intention "'of Congress thus to deprive parties claiming property "'of which they were in possession of the usual pro- "'cesses of the law in defense of their rights.' Marshal "v. Knox, 16 Wall., 556, 21 L. ed. 484; Smith v. Mason, "14 Wall., 419, 20 L. ed. 748."

Louisville Trust Co. v. Comingor, 184 U. S., 18.
Jaquith v. Rowley, 188 U. S., 620.
Pickens v. Roy, 187 U. S., 177.
Marshall v. Knox, 16 Wall., 551.
In re Buntrock Clothing Co., 92 Fed., 886.

II.

The lien accrued March 16, 1895, by the entry of judgment (2 *Ballinger's Annotated Codes & Statutes*,

§ 5132). The petition in bankruptcy was not filed until May 10, 1899. The order discharging the bankrupt was not made until August 9, 1899, and the order setting aside the land as exempt and awarding it to the bankrupt was not made until August 12, 1899.

On April 12, 1899, nearly a month prior to the filing of the petition in bankruptcy and four months prior to the award of the land to the bankrupt, the land had been taken possession of by the state court, having unquestioned jurisdiction, for the purpose of satisfying the lien of plaintiffs in error thereon, under a writ of execution issued out of the state court duly levied upon said land at that date.

"It is true that an officer seizing property under pro-"cess acts as the agent of the court out of which the "process issued, and his possession becomes the "possession of the court."

1 *Freeman on Execution* (2d ed.), § 135.
Frazier v. Southern Loan & Trust Co., 99 U. S., 707.

This property was still in the possession and jurisdiction of the state court up to May 13, 1899, when it was sold to plaintiffs in error by the sheriff in obedience to the state court's process. On May 27, 1899, the state court continued in the exercise of its jurisdiction and made an order confirming the sale and declaring it valid. Either the state court had jurisdiction to sell and the sale was, therefore, valid and conclusive, or the bringing of the bankruptcy proceeding, or the adjudi-

cation of bankruptcy, *ipso facto* took its jurisdiction away and vested jurisdiction of the property and of the lien in the bankruptcy court.

The language of this court in *Eyster v. Gaff*, 91 U. S., 521, is very apposite here.

"It is a mistake to suppose that the Bankrupt Law "avoids of its own force all judicial proceedings in the "state or other courts the instant one of the parties is "adjudged a bankrupt. There is nothing in the act which "sanctions such a proposition. The court in the case be- "fore us had acquired jurisdiction of the parties and of "the subject matter of the suit. It was competent to ad- "minister full justice and was proceeding according to "the law which governed such a suit to do so. It could "not take judicial notice of the proceedings in bank- "ruptcy in another court however seriously they might "have affected the rights of the parties to the suit "already pending.

"It was the duty of that court to proceed to a decree as "between the parties before it, until by some proper "pleadings in the case it was informed of the changed "relations of any of those parties to the subject matter "of the suit. Having such jurisdiction and performing "its duty as the case stood in that court, we are at a loss "to see how its decrees can be treated as void. It is al- "most certain, that if at any stage of the proceedings "before sale or final confirmation, the assignee had in- "tervened, he would have been heard to assert any right "he had, or set up any defense to the suit."

In *Marshall v. Knox*, 16 Wall., 551, this court said:

"Such case is similar to that of an execution, in refer-
"ence to which it has been held that, where a levy is
"made before the commencement of proceedings in
"bankruptcy, the possession of the officer cannot be
"disturbed by the assignee."

In re Easley, 93 Fed., 419.

The property having been in the possession of the state court and under its jurisdiction when the petition in bankruptcy was filed, and that jurisdiction having been exercised upou it prior to the order of exemption and award by the bankruptcy court, such subsequent action by the bankruptcy court could neither devest the state court of its jurisdiction, nor invalidate and nullify the state court's action previously had under such jurisdiction.

"The state courts had jurisdiction over the parties
"and the subject matter and possession of the property
"and it is well settled that where property is in the actual
"possession of the court this draws to it the right to de-
"cide upon conflicting claims to its ultimate possession
"and control."

Metcalf Brothers & Co. v. Barker, 187 U. S., 165.
Pickens v. Roy, 187 U. S., 177.
Peck v. Jenness, 7 How., 612.
Marshall v. Knox, 16 Wall., 551.
Norton v. Boyd, 3 How., 426.
Yeatman v. Institution, 95 U. S., 764.

In re Buntrock Clothing Co., 92 Fed., 886.
Frazier v. Southern Loan & Trust Co., 99 Fed., 707.
In re English, 122 Fed. Rep., 113.
White v. Thompson, 119 Fed., 868.
In re Hunt, Fed. Cas., 6883.
Collier on Bankruptcy, pp. 20, 21.

The decision of the state court in the case at bar rested on the theory that the order of the bankruptcy court, awarding the property to the bankrupt, related back to the filing of the petition and antedated the sale, and therefore the sale was void. There is no word anywhere in the bankruptcy act of 1898, giving such relation to such an order, and this effect is arbitrarily created without statutory authority and, it is submitted, does not exist. But though the order did relate back so as to antedate the sale, in order to nullify the state court's action, it had to devest the state court of its jurisdiction as of the date of the filing of the petition, and the bankruptcy court had to adjudicate the adverse interest of plaintiffs in error in a summary proceeding, through jurisdiction had from the time of filing the petition, and the state court so held:

"It must be borne in mind that the order of the bankruptcy court related back to the time of the filing of the petition in bankruptcy, and is a judgment of that court that the property was exempt at that time, and is, in its effect, a judgment that the respondents' judgment was not a lien on it." (Opinion, trans., p. 28.)

This, as we think we have very clearly shown above, this court has declared the bankruptcy act does not permit.

The property might have been made a homestead only a day before the 12th day of August, 1899, when the order of exemption was made, and not have been such when it was sold by the state court (2 *Ballinger's Annotated Codes & Statutes*, §§ 5243-5246, see appendix), and the bankrupt had full opportunity to show what in fact was the exact condition of the property on the day of its sale, by proper action in the state court, if he desired to protect it from the lien, then in process of foreclosure; and the plaintiff in error had the right to protect his lien, by litigating in a plenary suit in the state court the question whether on the day of sale the property was in fact a homestead or exempt.

THE FEDERAL QUESTION.

I.

The lien grew out of a legal proceeding more than four months prior to the bankruptcy proceeding, was not avoided by the act, and, very clearly, by sections 67f and 67d of the act there is intended and provided protection for it and the title acquired under it, and the act gives immunity to its owners from its destruction by or through the operation of the act. This right is had by plaintiffs in error under and by virtue of the act. All the foregoing cases are authority supporting this proposition.

Metcalf Brothers & Co. v. Barker, 187 U. S., 165.
In re Kirby Dennis Co., 95 Fed., 119.
In re Laird, 109 Fed., 550.

This right to the protection of their lien under this Federal statute, this immunity from its operation granted by it to this lien, was denied and taken away from plaintiffs in error by the ruling of the state supreme court.

But it is insisted by defendants in error that no Federal question is involved in the case at bar, and, therefore, this court is without jurisdiction, it being contended that the only right claimed under the bankruptcy act was that claimed by the defendants in error, to-wit: the protection of Laugenour's discharge in bankruptcy and of the order of the bankruptcy court setting aside the property as exempt, and that this claim of right was decided in favor of the parties asserting it (Third affirmative defense of the answer, trans., pp. 5, 6).

It is quite true that the defendants in error have asserted very distinctly in this litigation the right or immunity which, as a general rule, is found in the discharge in bankruptcy and in the order setting aside the bankrupt's exemptions. It is equally true, however, that the bankruptcy act recognizes and provides exceptions to the operation of such discharge and such award of exemptions, which exceptions give positive protection to those coming within them from the operation of such discharge and such award. The plaintiffs in error are clearly within one of such exceptions

and are entitled to the immunity thus given them by this Federal statute. Liens accruing prior to four months preceding the filing of the petition in bankruptcy constitute an exception to the operation of the discharge and of the award of exemptions, and are immune from their operation, and this immunity or right was definitely and emphatically asserted by the pleadings on behalf of plaintiffs in error, was debated in the courts, was forced on the attention of the state supreme court, and was squarely met and decided by it adversely to the plaintiffs in error.

The defendants in error having asserted as their defense the general rule relative to the protection lying in the discharge and the award of exemptions under the act, the plaintiffs in error in their reply to such claim, clearly and distinctly asserted on their behalf an exception to such general rule, also lying within the act, and claimed the immunity of such exception as their defense to the right asserted under the general rule by the defendants in error. Paragraph three of the reply of plaintiffs in error is as follows:

"3. That on the date of the rendition of said judg-
"ment, to-wit: On the 16th day of March, 1895, said
"George F. Laugenour and Jane Laugenour were the
"owners in fee simple of said real estate and the said
"judgment, immediately after its rendition and filing,
"became and constituted under the laws of this state, a
"lien thereon; and said lien which culminated in the
"aforesaid sale of real estate to plaintiffs was obtained

"and created pursuant to said suit, and more than four "months prior to the filing of the alleged petition in "bankruptcy mentioned in par. 4 of page 4 of defend- "ant's answer." (Trans., p. 9.)

This pleading standing by itself, points with unerring accuracy to the assertion of an immunity under the bankruptcy act and, read together with the third affirmative defense of the answer of defendants in error (Trans., pp. 5, 6), points with equal certainty to an exception to the general rule pleaded by defendants in error, and to a claim of immunity under such exception. The pleadings standing by themselves are thus fully sufficient to clearly show the assertion of an immunity or right, claimed under the bankruptcy act, but reference to the opinion of the state supreme court discloses that this asserted right on the part of plaintiffs in error was forced upon the attention of that court, was debated before it and was squarely decided by it against plaintiffs in error (Trans., pp. 23-29). Plaintiffs in error are thus brought, so far as the existence of a Federal question is concerned, completely within the rule announced by this court, and a Federal question is clearly shown.

Palmer v. Hussey, 119 U. S., 96.
McCormick v. Market Nat. Bank, 165 U. S., 538.

In *McCormick v. Market National Bank. supra*, in condemning and refusing to follow a prior decision in accord with the contention made by defendants in error in the case at bar, the court said:

"But the court there failed to notice that the decision, "while in favor of the right or immunity, set up by the de- "fendant, of a discharge under the bankruptcy act, was "also against the right or immunity, set up by the plain- "tiff under the clause excepting fiduciary debts from the "effect of that discharge."

It is urged in the brief on behalf of defendants in error, that this court cannot look to the opinion of the state supreme court to determine the point decided by that court, in order to determine whether a Federal question is presented. We think we have shown above that the Federal question stands out clear and strong on the face of the pleadings alone, but that the opinion of the state court may be resorted to by this court, to determine the exact point decided, has been long established in this court, and the authorities cited by defendants in error have been superseded by later decisions. Both the constitution of the state of Washington (Article 4, section 2, see appendix) as well as the statutes of the state (2 *Ballinger's Annotated Codes & Statutes*, section 4654, see appendix) require all the decisions of the supreme court of the state to be in writing, and the opinion in the case at bar is a part of the record (Trans., pp. 23-29).

Kreiger v. Shelby R. R. Co., 125 U. S., 39.
Columbia W. Power Co. v. Columbia etc. Co., 172 U. S., 475.

If the right or immunity was specially set up or claimed in such manner as to bring it to the attention

of the state court, it is sufficient. The form in which the question is raised is not material.

Greenbay & M. Canal Company v. Patten Paper Co., 172 U. S., 58.

If not raised until the case is in the state supreme court it is still sufficient; and, though the pleadings are obscure, if it clearly appears that the point was raised and decided in the highest state court, it is enough.

Sully v. American National Bank, 178 U. S., 289.
Rothschild v. Knight, 184 U. S., 334.
Bridge Proprietors v. Hoboken L. & I. Co., 68 U. S., 116.

It is not necessary to specify the law; the court takes judicial knowledge of the law.

Bridge Proprietors v. Hoboken L. & I. Co., 68 U. S., 116.

Respectfully submitted,

C. S. VOORHEES,
REESE H. VOORHEES,
H. A. P. MYERS,
W. T. WARREN,
Counsel for Plaintiffs in Error.

APPENDIX.

Sec. 5243. MODE OF SELECTION.

In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

Sec. 5244. DECLARATION, WHAT TO CONTAIN:

The declaration of homestead must contain, —

1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

Sec. 5245. DECLARATION MUST BE RECORDED.

The declaration must be recorded in the office of the auditor of the county in which the land is situated.

Sec. 5246. TENURE BY WHICH HOMESTEAD IS HELD.

From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created

under the provisions of this chapter; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this chapter.

Sec. 4654. NECESSARY FOR QUORUM.

It shall require a majority of the justices of the supreme court to form a quorum and pronounce a decision. In the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated.

2 *Ballinger's Aannotated Codes & Statutes of Washington.*

Sec. 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

Art IV, § 2, *Constitution of the State of Washington.*

IN THE

Supreme Court of the United States.

October Term, 1904.

A. L. SMALLEY and F. McLELLAN,
Plaintiffs in Error,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR,
Defendants in Error.
No. 97.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFFS IN ERROR.

(Submitted under the 20th rule.)

STATEMENT.

This is a suit in ejectment brought by the plaintiffs in error against the defendants in error to recover possession of certain real property. Plaintiffs in error assert title under the lien of a judgment gotten by plaintiffs in error and another, against George F. Laugenour, one of the defendants in error, and the resulting sale of said land upon execution to satisfy said lien, the land being bought in by the plaintiffs in error at such sale (Trans., pp. 10, 11). The said judgment was entered on March 16th, 1895, from which date the lien accrued (Findings 3, 11, trans., pp. 10, 11, 3-5). Upon April

12th, 1899, an execution was issued out of the state court upon the said property and levied thereon by the sheriff upon said last named date, and thereafter, to-wit: on May 13, 1899, the said land was sold by the sheriff under said execution so levied, and was bought in by the plaintiffs in error. On May 27th, 1899, the state court duly made its order confirming said sale and declaring it valid (Trans., p. 11).

The defense, material here, set up by defendants in error, was that on May 10, 1899, over four years after the accrual of the said lien and about a month after the levy of the execution on the property, defendant George F. Laugenour filed a petition in bankruptcy, and thereafter, to-wit: on the 11th day of May, 1899, was adjudged a bankrupt. That, on August 9, 1899, the United States District Court, as a court of bankruptcy, discharged said George F. Laugenour as a bankrupt and that, on the 12th day of August, 1899, the said court made an order, in the bankruptcy proceeding, setting aside the said property involved in the ejectment suit as exempt and awarding it to the said bankrupt (Trans., pp. 6, 12).

The trial court awarded the land, in the ejectment proceeding, to the plaintiffs in error, and on appeal the state supreme court reversed the court below and awarded the land to the defendants in error (Trans., pp. 23-29). The decision of the state supreme court rested entirely upon a construction of the act of Congress of July 1, 1898 (30 *U. S. Stats. at Large*, 544), to the effect that the bankruptcy court had jurisdiction of the property, and had passed upon the re-

spective rights of the plaintiffs and defendants in error, and had decided against the plaintiffs in error, and that said decision was *res adjudicata*. The state supreme court said:

"Passing to the merits of the controversy it is at once "obvious that the correctness of the judgment of the "trial court must depend upon the effect that is given "to the order of the bankruptcy court setting apart to "the bankrupt the property in question as property "exempt from the claims of his creditors." (Opinion state supreme court, trans., p. 25.)

ASSIGNMENT OF ERRORS.

(**Trans., pp. 37-38.**)

I.

The court erred in holding that under the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), it was not necessary for the trustee to "set apart the bankrupt's exemptions" as a pre-requisite to the making of a valid order by the bankruptcy court determining the claims of the bankrupt to his exemptions under said act of Congress.

II.

The court erred in holding that the court of bankruptcy, under said act of Congress, had power to make a valid order setting apart as exempt certain of the bankrupt's property without the pre-requisite of the appointment of a trustee under said act.

III.

The court erred in holding that the court of bankruptcy had jurisdiction under the said act of Congress to adjudicate in a summary manner as to the validity or existence of a lien claimed to have accrued upon the real property of the bankrupt more than four months prior to the filing of the petition in bankruptcy under the said act of Congress.

IV.

The court erred in holding that after the process of the state court had attached to the real property of the bankrupt and it was in course of being sold under such process, the order of the bankruptcy court under said act of Congress setting aside such property as exempt, operated without any stay or injunction being imposed upon the action of the state court or its process or the sale in progress, to interfere with the action of the state court or its process in that regard, and invalidated the sale of said property had under such process of the state court.

V.

The court erred in holding that the order of the bankruptcy court under the said act of Congress setting apart as exempt the said real property to the bankrupt, made subsequent to the sale under the process of the state court of the said property, so subsequently set apart, related back to the date of the filing of the petition in bankruptcy so as to take effect prior to said sale and invalidate the same.

VI.

The court erred in holding that the said order by the bankruptcy court under the said act of Congress setting aside as exempt the said real property to the bankrupt, adjudicated, as between the bankrupt and the said A. L.

Smalley and F. McLellan, the fact of the exempt character of the said property so as to make the sale under the process of the state court of said property upon a lien of a judgment thereon, said sale occurring prior to said order by the bankruptcy court, invalid and void.

VII.

The court erred in holding that the said order of the bankruptcy court, under the said act of Congress setting apart as exempt the said real property to the bankrupt was *res adjudicata* as between the said bankrupt and the said A. L. Smalley and F. McLellan as to exempt character of the said real property, with regard to the lien of the judgment had thereon by the said A. L. Smalley and the said F. McLellan.

VIII.

The court erred in holding that at the time of the making of the said order by the bankruptcy court setting aside the said real property as exempt the said real property was within the jurisdiction of the said bankruptcy court.

IX.

The court erred in giving judgment against the said A. L. Smalley and F. McLellan.

X.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress, to-wit: "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), to have the validity or invalidity of the sale of the bankrupt's real property under the process of the state court, adjudicated in the

state court uninfluenced by the order of the bankruptcy court setting said property aside as exempt.

XI.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress known as the bankruptcy act, to-wit: the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), to have the lien claimed and had by them upon the bankrupt's real property before four months prior to the filing of the petition in bankruptcy, adjudicated by the state court together with every fact tending to establish the validity or invalidity of said lien.

BRIEF.

THE MERITS.

I.

The entry of the judgment gave to the plaintiffs in error a lien upon the land in controversy.

"The real estate of any judgment debtor and such as "he may acquire, shall be held and bound to satisfy any "judgment of the district or circuit court of the United "States, if rendered in this state, or of the superior or "supreme court, or any judgment of a justice of the "peace for the period of five years from the day on "which said judgment was rendered, and such judgment "shall be a lien thereupon to commence as follows: "Judgments of the superior court of the county in which

"real estate of the judgment debtor is situated, from the "date of the entry thereof; judgments of the district or "circuit courts of the United States, if rendered in this "state; judgments of the supreme court; judgments of "the superior court of any county other than the county "in which said judgment was rendered, and judgments "of a justice of the peace, from the time of the filing "and indexing of a duly certified transcript or abstract "of such judgments, as provided by this chapter, with "the county clerk of the county in which said real "estate is situated."

2 *Ballinger's Annotated Codes & Statutes of Washington*, § 5132.

The lien attached at the time of entry of the judgment, not at the time of the levy of the execution.

Mayer v. Morgan, 26 Wash., 71.

The jurisdiction of the bankruptcy courts has been always strictly construed with the view of restricting interference with the jurisdiction of the state courts.

Bardes v. First National Bank, 178 U. S., 524.

If the lien had been a mortgage, or there had been an interest claimed in the land under a disputed deed, it can hardly be said that the summary order of the court, declaring the property exempt, adjudicated such conflicting adverse claims therein. Nor from the nature of the case does it logically follow that the court intended to adjudicate any interest claimed in the land. The

action of the court was an "order in said bankruptcy proceedings," not a *judgment* in a plenary suit (Finding 16, trans., p. 12). It is entirely consistent with the terms of the order that any lien actually existing prior to the date on which the order was made, was left unaffected by such order. As to all debts sought to be enforced against the bankrupt in the bankruptcy proceedings, and as between the trustee and bankrupt, the order can properly operate (30 *U. S. Stats. at Large*, 565, § 70). As to all interests in the land claimed by persons not taking advantage of the bankruptcy proceedings, it cannot properly operate. All creditors asking protection from the bankruptcy court are protected; they lose nothing by the bankrupt taking for his exemptions a mortgaged piece of land, or a piece of land a part of which a third person owns. If the bankrupt desires to take for his exemptions a piece of land so burdened, it is his privilege. The exempt character of the property, so far as this interest born of the lien and the title under the sale was concerned, was left to be determined by the state court. The mere act of the court in setting the property aside as exempt did not affect the interest had in the land by plaintiffs in error at the filing of the petition in bankruptcy.

Lockwood v. Exchange Bank, 190 U. S., 294.
White v. Thompson, 119 Fed., 868.
In re Hunt, Fed. Cas., 6883.
In re Little, 110 Fed., 621.
In re Gibbs, 109 Fed., 627; s. c., 103 Fed., 782.
In re Dunavant, 96 Fed., 542.

Plaintiffs in error lost no right by failing to prove their debt.

Yeatman v. New Orleans Sav. Inst., 95 U. S., 764.

If the order awarding the exemptions is *res adjudicata* as to the rights of plaintiffs in error, it is because the bankruptcy court took jurisdiction of such rights and passed upon them. No cause of action was set up and no special relief was asked against plaintiffs in error. They were merely notified to present their claims (Findings 5, 6, trans., p. 6). The bankruptcy court did not have jurisdiction, in a summary proceeding, of the adverse interest in the property had by plaintiffs in error. Their adverse rights in the property could be extinguished only in a plenary suit.

"So far as this view rested on the contention that, as "Comingor was joined with the bankrupts in the peti- "tion for adjudication, he therefore continued to be sub- "ject to the orders of the court without other process, we "agree with the circuit court of appeals that it cannot "be sustained. As we understand the record, the peti- "tion in bankruptcy set up no cause of action and prayed "no special relief against Comingor, and he was appar- "ently made a defendant because adjudication would put "an end to further action by him as assignee. Clearly, as "the circuit court of appeals points out, it would be in- "admissible to permit creditors to deprive an assignee of "his right to have his claims adjudicated by the proper "court and in the customary mode of proceeding, by the "device of making him a party to the petition for an ad-

"judication and so attempting to bring him into the case "for all purposes. Nor in this matter was any petition "by the trustee, or by any other person, filed against "Comingor to recover these sums, and the orders were "entered by the referee on the record as it stood, so that "there was no pretense whatever of a plenary suit in "that court, in form or in substance.

"The proceeding was purely summary. The de- "termination of the merits on the facts was not open to "revision by appeal or writ of error under the bankrupt "law. If Comingor had been entitled to a trial by jury, "he could not have obtained it as of right. The collection "of the amounts found due would be enforceable, not by "execution, but by commitment.

"'We think that it could not have been the intention "'of Congress thus to deprive parties claiming property "'of which they were in possession of the usual pro- "'cesses of the law in defense of their rights.' Marshal "v. Knox, 16 Wall., 556, 21 L. ed. 484; Smith v. Mason, "14 Wall., 419, 20 L. ed. 748."

Louisville Trust Co. v. Comingor, 184 U. S., 18.
Jaquith v. Rowley, 188 U. S., 620.
Pickens v. Roy, 187 U. S., 177.
Marshall v. Knox, 16 Wall., 551.
In re Buntrock Clothing Co., 92 Fed., 886.

II.

The lien accrued March 16, 1895, by the entry of judgment (2 *Ballinger's Annotated Codes & Statutes*,

§ 5132; findings 3, 11, trans., pp. 10, 11, 3-5). The petition in bankruptcy was not filed until May 10, 1899 (Finding of fact 12, trans., pp. 12, 6). The order discharging the bankrupt was not made until August 9, 1899, and the order setting aside the land as exempt and awarding it to the bankrupt was not made until August 12, 1899 (Findings of fact 15, 16, trans., pp. 12, 6).

On April 12, 1899, nearly a month prior to the filing of the petition in bankruptcy and four months prior to the award of the land to the bankrupt, the land had been taken possession of by the state court, having unquestioned jurisdiction, for the purpose of satisfying the lien of plaintiffs in error thereon, under a writ of execution issued out of the state court duly levied upon said land at that date (Finding of fact 4, trans., p. 11).

"It is true that an officer seizing property under pro-
"cess acts as the agent of the court out of which the
"process issued, and his possession becomes the pos-
"session of the court."

1 *Freeman on Execution* (2d ed.), § 135.
Frazier v. Southern Loan & Trust Co., 99 U. S., 707.

This property was still in the possession and jurisdiction of the state court up to May 13, 1899, when it was sold to plaintiffs in error by the sheriff in obedience to the state court's process (Finding of fact 4, trans., p. 11). On May 27, 1899, the state court continued in the exercise of its jurisdiction and made an order con-

firming the sale and declaring it valid (Finding of fact 5, trans., p. 11). Either the state court had jurisdiction to sell and the sale was, therefore, valid and conclusive, or the bringing of the bankruptcy proceeding, or the adjudication of bankruptcy, *ipso facto* took its jurisdiction away and vested jurisdiction of the property and of the lien in the bankruptcy court.

The language of this court in *Eyster v. Gaff*, 91 U. S., 521, is very apposite here.

"It is a mistake to suppose that the Bankrupt Law "avoids of its own force all judicial proceedings in the "state or other courts the instant one of the parties is "adjudged a bankrupt. There is nothing in the act which "sanctions such a proposition. The court in the case be-"fore us had acquired jurisdiction of the parties and of "the subject matter of the suit. It was competent to ad-"minister full justice and was proceeding according to "the law which governed such a suit to do so. It could "not take judicial notice of the proceedings in bank-"ruptcy in another court however seriously they might "have affected the rights of the parties to the suit "already pending.

"It was the duty of that court to proceed to a decree as "between the parties before it, until by some proper "pleadings in the case it was informed of the changed "relations of any of those parties to the subject matter "of the suit. Having such jurisdiction and performing "its duty as the case stood in that court, we are at a loss "to see how its decrees can be treated as void. It is al-

"most certain, that if at any stage of the proceedings "before sale or final confirmation, the assignee had in- "tervened, he would have been heard to assert any right "he had, or set up any defense to the suit."

In *Marshall v. Knox*, 16 Wall., 551, this court said:

"Such case is similar to that of an execution, in refer- "ence to which it has been held that, where a levy is "made before the commencement of proceedings in "bankruptcy, the possession of the officer cannot be "disturbed by the assignee."

In re Easley, 93 Fed., 419.

The property having been in the possession of the state court and under its jurisdiction when the petition in bankruptcy was filed, and that jurisdiction having been exercised upon it prior to the order of exemption and award by the bankruptcy court, such subsequent action by the bankruptcy court could neither devest the state court of its jurisdiction, nor invalidate and nullify the state court's action previously had under such jurisdiction.

"The state courts had jurisdiction over the parties "and the subject matter and possession of the property "and it is well settled that where property is in the actual "possession of the court this draws to it the right to de- "cide upon conflicting claims to its ultimate possession "and control."

Metcalf Bros. & Co. v. Barker, 187 U. S., 165.

Pickens v. Roy, 187 U. S., 177.
Peck v. Jenness, 7 How., 612.
Marshall v. Knox, 16 Wall., 551.
Norton v. Boyd, 3 How., 426.
Yeatman v. Institution, 95 U. S., 764.
In re Wells, 114 Fed., 222.
In re Buntrock Clothing Co., 92 Fed., 886.
Frazier v. Southern Loan & Trust Co., 99 Fed., 707.
In re English, 122 Fed., 113.
White v. Thompson, 119 Fed., 868.
In re Hunt, Fed. Cas., 6883.
Collier on Bankruptcy, pp. 20, 21.

The decision of the state court in the case at bar rested on the theory that the order of the bankruptcy court, awarding the property to the bankrupt, related back to the filing of the petition and antedated the sale, and therefore the sale was void. There is no word anywhere in the bankruptcy act of 1898, giving such relation to such an order, and this effect is arbitrarily created without statutory authority and, it is submitted, does not exist. But though the order did relate back so as to antedate the sale, in order to nullify the state court's action, it had to devest the state court of its jurisdiction as of the date of the filing of the petition, and the bankruptcy court had to adjudicate the adverse interest of plaintiffs in error in a summary proceeding, through jurisdiction had from the time of filing the petition, and the state court so held:

"It must be borne in mind that the order of the bank-
"ruptcy court related back to the time of the filing of
"the petition in bankruptcy, and is a judgment of that
"court that the property was exempt at that time, and
"is, in its effect, a judgment that the respondents' judg-
"ment was not a lien on it." (Opinion, trans., p. 28.)

This, as we think we have very clearly shown above, this court has declared the bankruptcy act does not permit.

The property might have been made a homestead only a day before the 12th day of August, 1899, when the order of exemption was made, and not have been such when it was sold by the state court (2 *Ballinger's Annotated Codes & Statutes*,§§ 5214-5246, see appendix), and the bankrupt had full opportunity to show what in fact was the exact condition of the property on the day of its sale, by proper action in the state court, if he desired to protect it from the lien, then in process of foreclosure; and the plaintiff in error had the right to protect his lien, by litigating in a plenary suit in the state court the question whether on the day of sale the property was in fact a homestead or exempt.

THE FEDERAL QUESTION.

The lien grew out of a legal proceeding more than four months prior to the bankruptcy proceeding, was not avoided by the act, and, very clearly, by sections 67f and 67d of the act there is intended and provided protection for it and the title acquired under it, and the

act gives immunity to its owners from its destruction by or through the operation of the act. This right is had by plaintiffs in error under and by virtue of the act. All the foregoing cases are authority supporting this proposition.

Metcalf Brothers & Co. v. Barker, 187 U. S., 165.
In re Kirby Dennis Co., 95 Fed., 119.
In re Laird, 109 Fed., 550.

This right to the protection of their lien under this Federal statute, this immunity from its operation granted by it to this lien, was denied and taken away from plaintiffs in error by the ruling of the state supreme court.

But it is insisted by defendants in error that no Federal question is involved in the case at bar, and, therefore, this court is without jurisdiction, it being contended that the only right claimed under the bankruptcy act was that claimed by the defendants in error, to-wit: the protection of Laugenour's discharge in bankruptcy and of the order of the bankruptcy court setting aside the property as exempt, and that this claim of right was decided in favor of the parties asserting it (Third affirmative defense of the answer, trans., pp. 5, 6).

It is quite true that the defendants in error have asserted very distinctly in this litigation the right or immunity which, as a general rule, is found in the discharge in bankruptcy and in the order setting aside the bankrupt's exemptions. It is equally true, however, that the bankruptcy act recognizes and provides ex-

ceptions to the operation of such discharge and such award of exemptions, which exceptions give positive protection to those coming within them from the operation of such discharge and such award. The plaintiffs in error are clearly within one of such exceptions and are entitled to the immunity thus given them by this Federal statute. Liens accruing prior to four months preceding the filing of the petition in bankruptcy constitute an exception to the operation of the discharge and of the award of exemptions, and are immune from their operation and this immunity or right was definitely and emphatically asserted by the pleadings on behalf of plaintiffs in error, was debated in the courts, was forced on the attention of the state supreme court, and was squarely met and decided by it adversely to the plaintiffs in error.

The defendants in error having asserted as their defense the general rule relative to the protection lying in the discharge and the award of exemptions under the act, the plaintiffs in error in their reply to such claim, clearly and distinctly asserted on their behalf an exception to such general rule, also lying within the act, and claimed the immunity of such exception as their defense to the right asserted under the general rule by the defendants in error. Paragraph three of the reply of plaintiffs in error is as follows:

"3. That on the date of the rendition of said judg-
"ment, to-wit: On the 16th day of March, 1895, said
"George F. Laugenour and Jane Laugenour were the

"owners in fee simple of said real estate and the said "judgment, immediately after its rendition and filing, "became and constituted under the laws of this state, a "lien thereon; and said lien which culminated in the "aforesaid sale of real estate to plaintiffs was obtained "and created pursuant to said suit, and more than four "months prior to the filing of the alleged petition in "bankruptcy mentioned in par. 4 of page 4 of defend-"ant's answer." (Trans., p. 9.)

This pleading standing by itself, points with unerring accuracy to the assertion of an immunity under the bankruptcy act and, read together with the third affirmative defense of the answer of defendants in error (Trans., pp. 5, 6), points with equal certainty to an exception to the general rule pleaded by defendants in error, and to a claim of immunity under such exception. The pleadings standing by themselves are thus fully sufficient to clearly show the assertion of an immunity or right, claimed under the bankruptcy act, but reference to the opinion of the state supreme court discloses that this asserted right on the part of plaintiffs in error was forced upon the attention of that court, was debated before it and was squarely decided by it against plaintiffs in error (Trans., pp. 23-29). Plaintiffs in error are thus brought, so far as the existence of a Federal question is concerned, completely within the rule announced by this court, and a Federal question is clearly shown.

Palmer v. Hussey, 119 U. S., 96.
McCormick v. Market Nat. Bank, 165 U. S., 538.

In *McCormick v. Market National Bank, supra*, in condemning and refusing to follow a prior decision in accord with the contention made by defendants in error in the case at bar, the court said:

"But the court there failed to notice that the decision, "while in favor of the right or immunity, set up by the "defendant, of a discharge under the bankruptcy act, "was also against the right or immunity, set up by the "plaintiff under the clause excepting fiduciary debts "from the effect of that discharge."

It is urged on behalf of defendants in error, that this court cannot look to the opinion of the state supreme court to determine the point decided by that court, in order to determine whether a Federal question is presented. We think we have shown above that the Federal question stands out clear and strong on the face of the pleadings alone, but that the opinion of the state court may be resorted to by this court, to determine the exact point decided, has been long established in this court, and the authorities cited by defendants in error have been superseded by later decisions. Both the constitution of the state of Washington (article 4, section 2, see appendix) as well as the statutes of the state (2 *Ballinger's Annotated Codes & Statutes*, section 4654, see appendix) require all the decisions of the supreme court of the state to be in writing, and the opinion in the case at bar is a part of the record (Trans., pp. 23-29).

Kreiger v. Shelby R. R. Co., 125 U. S., 39.
Colum. W. P. Co. v. Columbia etc. Co., 172 U. S., 475.

If the right or immunity was specially set up or claimed in such manner as to bring it to the attention of the state court, it is sufficient. The form in which the question is raised is not material.

> *Greenbay & M. Canal Company v. Patten Paper Co.*, 172 U. S., 58.

If not raised until the case is in the state supreme court it is still sufficient; and, though the pleadings are obscure, if it clearly appears that the point was raised and decided in the highest state court, it is enough.

> *Sully v. American National Bank*, 178, U. S., 289.
> *Rothschild v. Knight*, 184 U. S., 334.
> *Bridge Props. v. Hoboken L. & I. Co.*, 68 U. S., 116.

It is not necessary to specify the law; the court takes judicial knowledge of the law.

> *Bridge Proprietors v. Hoboken L. & I. Co.*, 68 U. S., 116.

In their brief on the motion to dismiss or affirm, the defendants in error rested their case on two propositions, as being decided by the supreme court of Washington, and as being conclusive. We quote:

"1. That the adjudication of exemption made by the "Federal court was made with jurisdiction and was *res* "*adjudicata*. This was a decision *in favor* of Laugenour "granting a claim made by him to a title, right, privilege "or immunity under a previous adjudication of a federal "court and cannot now be reviewed by this court."

This proposition we have discussed.

"2. That the real estate being exempt an execution "sale thereof was ineffectual to pass title to the pur- "chaser. This question was decided solely under the "laws of the state of Washington and in no way involved "a Federal statute, the jurisdiction of the Federal court "or a Federal question, and cannot be reviewed by this "court."

Before the state law, to the effect that exempt property could not be sold under execution, could be applied by the state supreme court, that court had to make the property exempt, as to the lien and sale, by the construction of the bankruptcy act and by the denial of the immunity had thereunder by plaintiffs in error, such exemption and denial being accomplished by the holding of the state supreme court that the order of the bankruptcy court, setting the property aside as exempt, was made with jurisdiction to decide and did decide adversely and conclusively, as to the plaintiffs in error, the fact that the property was a valid homestead at the date of filing the petition and on the day of sale, that there was no lien, and that the sale was invalid. Thus the state court held that ultimately from the bankruptcy act came the destruction of the lien. The state supreme court said:

"If, therefore, the property in question was exempt "from execution at the time the sale was made under "the execution issued on the respondent's judgment,

"the respondents acquired no title thereto by their pur-
"chase at the execution sale, and, consequently, have
"no title on which they can maintain the present action.
"Now the appellants were at liberty to establish this
"fact in one or both of two ways, they could plead and
'prove the facts showing the property to have been
"exempt from execution at the time of the sale, thus
"making the question directly an issue in the state
"court, *or they could plead and prove that the question*
"*had been once adjudicated between the parties in a court*
"*of competent jurisdiction having the parties and the sub-*
"*ject matter before it. The appellants chose the latter*
"*method.* They sought to show that the property was
"exempt by showing that a bankruptcy court having
"jurisdiction of the person and estate of the appellants
"in a proceeding in bankruptcy in which the respond-
"ents' judgment was provable had awarded the prop-
"erty to the appellants as properly exempt from the
"claims of his creditors. *As this order related back to*
"*the time of the institution of the bankruptcy proceedings,*
"it is *res judicata*, if it has the force of *res judicata* at
"all, that the property was exempt from sale at the
"time sale thereof was made, and, hence, an adjudication
"that the sale was void." (Trans., p. 26. See also p. 28.)

It is manifest that the question that the state supreme court decided, and which decided the case adversely to plaintiffs in error, was not one of state law, but was one involving a Federal statute, the jurisdiction of the Federal court and a Federal question.

The state supreme court should be reversed.

Respectfully submitted,

C. S. VOORHEES,
REESE H. VOORHEES,
H. A. P. MYERS,
W. T. WARREN,
Counsel for Plaintiffs in Error.

APPENDIX.

Section 5214. HOMESTEAD—OF WHAT CONSISTS.

The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this chapter provided.

Sec. 5217. EXEMPT FROM FORCED SALE.

The homestead is exempt from execution or forced sale, except as in this chapter provided.

Sec. 5243. MODE OF SELECTION.

In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

Sec. 5244. DECLARATION, WHAT TO CONTAIN:

The declaration of homestead must contain,—

1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaraton, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

Sec. 5245. DECLARATION MUST BE RECORDED.

The declaration must be recorded in the office of the auditor of the county in which the land is situated.

Sec. 5246. TENURE BY WHICH HOMESTEAD IS HELD.

From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this chapter; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this chapter.

Sec. 4654. NECESSARY FOR QUORUM.

It shall require a majority of the justices of the supreme court to form a quorum and pronounce a decision. In the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated.

2 *Ballinger's Annotated Codes & Statutes of Washington.*

Sec. 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision.

The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

Art. IV, § 2, *Constitution of the State of Washington.*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

A. L. SMALLEY AND F. McCLELLAN,
Plaintiffs in Error,
vs.
GEORGE F. LAUGENOUR AND JANE LAUGENOUR,
Defendants in Error.

No. 384

In Error to the Supreme Court of the State of Washington.

Motion to Dismiss or Affirm.

MOTION

Come now George F. Laugenour and Jane Laugenour, defendants in error, and move the Court to dismiss the writ of error herein, or to affirm the judgment and decree, for the following reasons:

1. That this Court has no jurisdiction herein.
2. That no Federal question is involved herein.

HERMAN D. CROW,
JAS. A. WILLIAMS,
Of Counsel.
Spokane, Wash.

W. C. KEEGIN,
Counsel for Defendants in Error.
Washington, D. C.

THE PLEADINGS.

This is an action in ejectment, commenced in the Superior Court of Lincoln County, Washington, by A. L. Smalley and F. McClellan, plaintiffs in error, against Defendants George F. Laugenour and Jane Laugenour, his wife, the defendants in error, and one John F. Green, and one Henry Gilliland, to recover possession of the east half of section thirty-three (33), in township twenty-three (23) north of range thirty-seven (37) E. W. M., in Lincoln county, Washington. The complaint was in the usual form of ejectment, simply alleging that plaintiffs were at all times since May 23, 1900, owners of said real estate, entitled to the possession thereof, and that defendants had unlawfully entered into possession and were detaining the same. The complaint contains no allegation disclosing the source of plaintiffs' alleged title.

Defendants in their answer admitted that George F. Laugenour and Jane Laugenour were husband and wife, but by specific denials traversed each and every other allegation of the complaint. Defendants Laugenour and wife also plead three affirmative defenses, the third being the only one material at this time. In this defense they, in substance, allege:

1. That George F. Laugenour was at all times since May 13, 1899, the owner of the real estate in the complaint described, and entitled to the possession thereof.

2. That on the 16th day of March, 1895, the plaintiffs, A. L. Smalley and F. McClellan, and one L. J. Hutchings, then co-partners under the firm name and style of L. J. Hutchings & Company, obtained a personal judgment in the Superior Court of Lincoln county, Washington, against said George F. Laugenour.

3. That after the entry of said judgment, to-wit: on the 13th day of May, 1899, an attempt was made by said judgment creditors to sell said real estate for the satisfaction of said judgment, under an *alias* execution issued thereon; that the plaintiffs became purchasers of said real estate at said sale, and that the only claim which plaintiffs have in or to said real estate, is by virtue of said judgment and said execution sale in satisfaction thereof.

4. That on May 10, 1899, George F. Laugenour, filed in

the United States District Court for the District of Washington, Eastern Division, a voluntary petition in bankruptcy, and on May 11, 1899, was adjudged a bankrupt.

5. That in said petition in voluntary bankruptcy, the names of the creditors of said bankrupt, including the names of said judgment creditors, and all of the property of said bankrupt, were scheduled, especially the real estate above described, which real estate was in said voluntary petition in bankruptcy claimed to be exempt from execution.

6. That after said adjudication, the referee in bankruptcy notified all creditors of said bankrupt, including said judgment creditors, the plaintiffs in this action, to present their claims, and that the first meeting of creditors would be held on June 5, 1899; that at said time no creditors appeared for the purpose of electing a trustee, and that as the schedule showed no property subject to the payment of debts, it was adjudged by the referee that no necessity existed for the appointment of a trustee in bankrupcy.

7. That afterward, to-wit: on the 9th day of August, 1899, an order was made discharging said George F. Laugenour in bankruptcy.

8. That on the 12th day of August, 1899, the Honorable C. H. Hanford, Judge of the United States District Court, for the State of Washington, Eastern Division, in said bankruptcy proceeding, regularly made and entered an order awarding and setting aside to said bankrupt, George F. Laugenour, as exempt, all the real estate above described.

To this answer plaintiff made reply, which reply contained certain admissions, denials and affirmative allegations. The only allegation in the affirmative reply pertaining to said bankruptcy proceeding, however, was set forth in the third paragraph thereof, and in substance alleged: That on the date of rendition of said judgment, to-wit: on the 16th of March, 1895, the said George F. and Jane Laugenour were owners of said real estate, and that said judgment immediately became a lien thereon, which lien was obtained more than four months prior to the filing of the petition in voluntary bankruptcy.

FINDINGS OF FACT.

Upon the issues formed, and upon the evidence, trial was had before the Judge of the Superior Court of Lincoln county, Washington, (a jury having been waived) and the Court made its Findings of Fact and Conclusions of Law which appear at pages 10-13, Transcript of Record. The findings of fact substantially sustained all of the allegations of the third affirmative defense of the answer of defendants above set forth.

The findings material on this hearing are substantially as follows:

1. That Defendants Laugenour and wife were the owners and in possession of said real estate as community property from and after March 16, 1895.

2. That on the 16th day of March, 1895, the said A. L. Smalley, F. McClellan and L. J. Hutchings obtained and entered said judgment against George F. Laugenour, in the Superior Court of Lincoln county, Washington.

3. That on April 12, 1899, an execution was issued on said judgment, levied on said real estate, and said real estate was sold thereunder on May 13, 1899, to plaintiffs for $532.15, to satisfy said judgment.

4. That said sale was confirmed on May 27, 1899.

5. That on May 23, 1900, the period of redemption having expired, a sheriff's deed was delivered to plaintiffs and duly recorded.

6. That said Laugenour and wife have at all times been in possession of said real estate.

7. That on May 10, 1899, George F. Laugenour filed his petition in voluntary bankruptcy, and on May 11, 1899, was regularly adjudged a bankrupt.

8. That in the petition in voluntary bankruptcy, the names of all creditors, including said judgment creditors, were regularly given, with their places of residence, and the amounts of their claims, and all of the property of said bankrupt, including said real estate, was scheduled, and said real estate was claimed to be exempt, under the laws of the State of Washington, and the bankruptcy act.

9. That after said adjudication of bankruptcy, the referee notified all creditors, and especially the plaintiffs, to present their

claims against said bankrupt, and advised them of the time of the first meeting of the creditors. That at said first meeting no creditors appeared, and the schedule showing no property applicable to the payment of debts, it was found by the referee that no necessity existed for the appointment of a trustee in bankruptcy.

10. That thereafter, on August 9, 1899, an order was regularly made, by the Honorable C. H. Hanford, Judge of the United States District Court, discharging said bankrupt from all debts and claims made proveable by the act of Congress relating to bankruptcy, against said estate which existed on May 10, 1899, except such debts as were by law especially exempted from the operation of the discharge in bankruptcy.

11. That on the 12th day of August, 1899, said C. H. Hanford, Judge of said Court, made an order in said bankruptcy proceedings setting aside to said bankrupt as exempt the real estate above described, and awarded said real estate to said bankrupt.

Upon the foregoing findings of fact, the Superior Court of Lincoln county, Washington, made its conclusions of law, and entered judgment in favor of the plaintiffs, decreeing that they were entitled to the immediate possession of said real estate. From this judgment the defendants appealed to the Supreme Court of Washington. No statement of facts was prepared, but the appeal was heard on the findings of fact made by the trial court. On such appeal the judgment of the Superior Court of Lincoln county, Washington, was reversed, and the cause was remanded, with instructions to enter judgment for the defendants, Laugenour and wife, in accordance with the prayer of their answer, dismissing the action, quieting their title, and for costs.

From this final judgment of the Supreme Court of the State of Washington, the writ of error herein has been allowed by the Chief Justice of that Court.

ASSIGNMENTS OF ERROR.

The following assignments of error have been made by the plaintiffs in error (Transcript of Record, pp. 37-38):

1. "The Court erred in holding that under the provisions of the Act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved

July 1, 1898, (30 U. S. Stats. at Large, p. 544) it was not necessary for the trustee to 'set apart the bankrupt's exemptions' as a pre-requisite to the making of a valid order by the bankruptcy court, determining the claims of the bankrupt to his exemptions under said Act of Congress."

2. "The Court erred in holding that the court of bankruptcy, under said Act of Congress, had power to make a valid order setting apart as exempt certain of the bankrupt's property without the pre-requisite of the appointment of the trustee under said act."

3. "The Court erred in holding that the court of bankruptcy had jurisdiction under the said Act of Congress to adjudicate in a summary manner as to the validity or existence of a lien claimed to have accrued upon the real property of the bankrupt more than four months prior to the filing of the petition in bankruptcy under the said Act of Congress."

4. "The Court erred in holding that after the process of the State court had attached to the real property of the bankrupt, and it was in course of being sold under such process, the order of the bankruptcy court under said Act of Congress, setting aside such property as exempt, operated, without any stay or injunction being imposed upon the action of the State court or its process or the sale in progress, to interfere with the action of the State court or its process in that regard, and invalidated the sale of said property had under such process of the State court."

5. "The Court erred in holding that the order of the bankruptcy court under the said Act of Congress setting apart as exempt the said real property to the bankrupt, made subsequent to the sale under the process of the State court of the said property, so subsequently set apart, related back to the date of the filing of the petition in bankruptcy so as to take effect prior to said sale and invalidate the same."

6. "The Court erred in holding that the said order by the bankruptcy court under the said Act of Congress setting aside as exempt the said real property to the bankrupt, adjudicated, as between the bankrupt and the said A. L. Smalley and F. McClellan, the fact of the exempt character of the said property so as to make the sale under the process of the State Court of said property upon a lien of a judgment thereon, said sale occurring prior to said order by the bankruptcy court, invalid and void."

7. "The Court erred in holding that the said order of the bankruptcy court under the said Act of Congress setting apart as exempt the said real property to the bankrupt was *res adjudicata* as between the said bankrupt and the said A. L. Smalley and F. McClellan as to the exempt character of the said real property, with regard to the lien of the judgment had thereon by the said A. L. Smalley and the said F. McClellan."

8. "The Court erred in holding that at the time of the making of the said order by the bankruptcy court setting aside the said real property as exempt the said real property was within the jurisdiction of the said bankruptcy court."

9. "The Court erred in giving judgment against the said A. L. Smalley and F. McClellan."

10. "The Court erred in holding that the said respondents, A. L. Smalley and F. McClellan, did not have the right under and by virtue of the said Act of Congress, to-wit: 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, (30 U. S. Stats. at Large, p. 544) to have the validity or invalidity of the sale of the bankrupt's real property under the process of the State court, adjudicated in the State court uninfluenced by the order of the bankruptcy court setting said property aside as exempt."

11. "The Court erred in holding that the said respondents, A. L. Smalley and F. McClellan, did not have the right under and by virtue of the said Act of Congress known as the bankruptcy act, to-wit: the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, (30 U. S. Stats. at Large, p. 544) to have the lien claimed and had by them upon the bankrupt's real property before four months prior to the filing of the petition in bankruptcy, adjudicated by the State court, together with every fact tending to establish the validity or invalidity of said lien."

ARGUMENT.

The decision of the Supreme Court of the State of Washington is reported in the 30th Washington, at page 307.

Plaintiffs in error assume this Court has jurisdiction because

an authority exercised under the United States has been drawn in question. It is apparent the main contention of appellants in error is, that the United States District Court for the Eastern District of Washington, did not have jurisdiction to declare the real estate in controversy to be exempt, or to award the same to George F. Laugenour, in the absence of an appointment of a trustee in bankruptcy.

It will be noticed that the only Federal authority involved in this action was the adjudication in bankruptcy in favor of Laugenour, and the order awarding him the land as exempt. This order was pleaded by Laugenour and wife, as an affirmative defense. Upon this order rested certain rights, privileges and immunities claimed by them. The decision of the State court recognized the validity of the order, was in their favor, *and not against* them.

The only jurisdiction of this Court to review a final judgment of the Supreme Court of a State, in a case of this character, arises under Section 709 of the United States Revised Statutes. It has been held by this Court that it has no jurisdiction over the final judgment of a State court, upon a writ of error, except in the cases specified in said Section 709, and that the jurisdiction of this Court is limited by said section with great care and in plain terms. It gives a writ of error to this Court, where a party claims a title, right, privilege or immunity under a law of Congress, or authority exercised under the United States, and the decision is *against* the right claimed. The Defendants Laugenour pleaded the discharge in bankruptcy, and the adjudication declaring said real estate to be exempt. The decision on said plea was *in favor* of Laugenour and wife, thus granting the title, right, privilege or immunity claimed under the judgment. This being the case, appellants in error are not entitled to a writ of error. Had the Court *denied* the title, right, privilege or immunity claimed by Laugenour and wife, then, by reason of such denial, they would have been entitled to a writ of error.

The policy of Congress in giving jurisdiction to the Supreme Court of the United States, to review the decision of the Supreme Court of a State, has been to so restrict such jurisdiction as simply to enable the Federal court to protect the general government from any invasion of its powers by a State government. In other words, where a Federal court has by adjudication awarded

any right or relief to a party, and a State court by its judgment enforces, recognizes or follows such adjudication of the Federal court, then the Supreme Court of the United States has no jurisdiction to review such action of the State court, even though the previous action of the Federal court, so recognized and enforced by the State court, had been erroneous or without jurisdiction.

Abbott vs. National Bank of Commerce, 175 U. S., 409.

In the case at bar, Laugenour pleaded his discharge as a bankrupt, his exemption under the order of the District Court of the United States, and claimed that these orders related back to the 10th day of May, 1899, the date on which his petition was filed. As the execution sale did not take place until May 13, 1899, his allowance of exemption took effect prior thereto. The Supreme Court of Washington has simply decided that the allowance of exemption was *res adjudicata*, that it was properly claimed in the Federal court, and that as the real estate was adjudged to be exempt, no lien under the judgment of plaintiffs could have attached to it, at any time, under the laws of the State of Washington.

The Supreme Court of Washington has made two holdings only, which are decisive of this case, without regard to any other question that may have been involved:

1. That the adjudication of exemption made by the Federal court was made with jurisdiction, and was *res adjudicata*. This was a decision *in favor of* Laugenour, granting a claim made by him to a title, right, privilege or immunity under a previous adjudication of a Federal court, and cannot now be reviewed by this Court.

2. That the real estate being exempt, an execution sale thereof was ineffectual to pass title to the purchaser. This question was decided solely under the laws of the State of Washington, and in no way involved a Federal statute, the jurisdiction of the Federal court, or a Federal question, and cannot be reviewed by this Court.

These two points are absolutely decisive of this case and are sufficient in themselves to sustain the judgment of the Supreme Court of the State of Washington without regard to any other question involved, and neither of them can be reviewed by this Court.

On the proposition that no Federal question is involved herein we cite the following authorities:

Fulton vs. McAffee, 16 Pet., 149.
Linton vs. Stanton, 12 How., 423.
Calcote vs. Stanton, 18 How., 243.
Ryan vs. Thomas, 4 Wall., 603.
Roosevelt vs. Meyer, 1 Wall., 512.
State of Missouri vs. Andriano, 138 U. S., 597.
De Lamars Nevada Gold Mining Co. vs. Nesbitt, 177 U. S., 523.

That above authorities, and many others to which they refer, clearly show this court to be without jurisdiction of this case. In Linton vs. Stanton, *supra*, this Court says: "The defendant pleaded his discharge under the bankrupt law of the United States, and at the trial offered in evidence the record of the proceeding in bankruptcy in the District Court in which he had obtained his certificate. Objections were taken to the regularity and validity of this discharge, but they were overruled by the court, and judgment rendered for the defendant. The plaintiff appealed to the Supreme Court of the State, where the judgment of the court below was affirmed, and this writ of error is brought to reverse that judgment."

"The writ must, we presume, have been prosecuted under a misconstruction of the 25th section of the Act of 1789, Ch. 20."

"We have no jurisdiction over the judgment of a state court upon a writ of error, except in cases specified in that section. And the jurisdiction of this Court is there limited with great care and in plain terms. It gives a writ of error to this Court where a party claims a right or exemption under a law of Congress, and the decision is *against* the right claimed. Undoubtedly the defendant, in pleading his discharge under the Bankrupt Law, claimed a right or exemption under a law of Congress. But in order to give jurisdiction, something more is necessary; the judgment of the state court *must be against the right claimed.* In the case before us the decision was *in favor of it*, and consequently no writ of error will lie to this Court under the provisions of the Act of 1789."

The above language could not be more applicable, if it had been written in this case.

In Missouri vs. Andriano, 138 U. S., *supra*, this court says:

"The object of the present Judiciary Act was not to give a right of review wherever the validity of an Act of Congress was

drawn in question, but to prevent the courts of the several states from impairing or frittering away the authority of the Federal Government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the state court to the Act in which the right is claimed, *be favorable to such right*, no such reason exists for a review by this court."

Appellants in error utterly fail to make any allegation in their pleadings raising a Federal question, or sufficient to show that they claim any right, title, privilege or immunity under any statute or authority of the United States, which right, title, privilege or immunity so pleaded and claimed was denied them by the state court. The section of any statute of the United States upon which appellants rely must have been specially set up and brought to the notice of the state court. The record in this case fails to show this to have been done by appellants in error.

Hoyt vs. Thompson, 66 U. S., 518.

The Steamboat Victory, 73 U. S., 382.

Home for Incurables vs. New York, 187 U. S., 155.

Assuming for the sake of argument, that an attempt was made by appellants in error to raise a Federal question, and that under the affirmative allegations of their reply they claimed some right, title, privilege or immunity under a statute or authority of the United States; yet the Transcript of Record utterly fails to show that any such Federal question was decided against them by the state court, or was decided at all.

In Chouteau vs. Gibson, 111 U. S., 200, Chief Justice Waite says: "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a Federal question was raised and presented to the highest court of the state for decision, *but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.*"

Murdock vs. Memphis, 20 Wall., 636.

Detroit City Railroad vs. Guthard, 114 U. S., 133.

Bridge Proprietors vs. Hoboken L. & I. Co., 68 U. S., 143.

Johnson vs. Risk, 137 U. S., 300.

County of Cook vs. Calumet & Chicago Canal Co, 138 U. S., 635.

In the third paragraph of plaintiff's reply, it is alleged, that their pretended lien was obtained more than four months prior to

the filing of the petition in bankruptcy. If appellants in error assume that by this portion of the reply any Federal question was raised which can be reviewed by this Court, we suggest the entire record utterly fails to show, that such question was ever presented to, or even decided by, the state court. Assuming that by this allegation of the reply, appellants claimed some right, title, privilege or immunity under a statute or authority of the United States, still the record utterly fails to show that such right, title, privilege or immunity was denied by the court; in fact, there is an utter absence of any showing that it was ever passed upon, or even considered by the state court. In fact, it was not considered. To give this Court jurisdiction it must appear affirmatively that the right, title, privilege or immunity claimed by appellants was positively denied by the state court.

"In order to give this Court jurisdiction under the judiciary act, it must appear from the record of the case, either by express terms or by clear or necessary intendment, that one of the questions which this Court has jurisdiction to re-examine and decide, *was actually decided* by the state court."

"This may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose."

Medberry vs. Ohio, 24 How., 413.
Hamilton Mfg. Co. vs. Massachusetts, 73 U. S., 632.
Rector vs. Ashley, 73 U. S., 142.
Williams vs. Norris, 12 Wheat., 117.
England vs. Gebhardt, 112 U. S., 502.

It does not appear from the pleadings, from any bill of exceptions, or by any certificate of the court, that a Federal question was actually decided by the state court. There is an attempt, however, upon the part of the appellants in error, to inject a Federal question on their behalf into the record, by assignments of error Nos. 10 and 11, but such assignments cannot be considered for any such purpose. We contend no Federal question is involved herein giving this Court jurisdiction.

W. C. KEEGIN,
Attorney for Defendants in Error, Washington, D. C.
HERMAN D. CROW,
JAS. A. WILLIAMS,
Of Counsel, Spokane, Wash.

IN THE

Supreme Court of the United States

October Term 1904

A. L. SMALLEY and F. MCCLELLAN,
Plaintiffs in Error,

vs.

GEORGE F. LAUGENOUR and JANE LAUGENOUR,
Defendants in Error.

No. 364 97

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF DEFENDANTS IN ERROR

(Submitted under the 20th rule)

MOTION TO DISMISS OR AFFIRM

Come now Geo. F. Laugenour and Jane Laugenour, defendants in error, and move the Court to dismiss the Writ of Error herein, or to affirm the judgment and decree for the following reasons:

1. That this Court has no jurisdiction herein.
2. That no federal question is involved herein.

H. D. CROW,
JAS. A. WILLIAMS,
of Counsel.

W. C. KEEGAN,
Counsel for Defendants
in Error

STATEMENT.

The Statement made by Plaintiffs in Error is incomplete in the following respects.

The petition in involuntary bankruptcy filed by Geo. F. Laugenour claimed the real estate involved in this Writ of Error as exempt to the bankrupt under the laws of the State of Washington, and in said petition, the names of all of the creditors of the bankrupt including Plaintiffs in Error, were given, with their place of residence, and on said petition Geo. F. Laugenour was adjudged a bankrupt on May 11, 1899 (two days before the execution sale), and on said day all of the creditors of the bankrupt, including Plaintiffs in Error were notified of the proceedings which had been taken. (Trans. pp. 11 and 21). The claim of exemption was specifically made under the statutes of Washington relating to the exemptions and was not confined to a claim of homestead.

It is not correct that the decision of the State Supreme Court rested entirely, or at all, upon a construction of the Act of Congress of July 1, 1898 (30 U. S. Stats. at large, 544), but the decision rested entirely upon a construction and application of the statutes of the State of Washington.

ARGUMENT.

MOTION TO DISMISS OR AFFIRM.

This motion to dismiss or affirm was presented in

the October term, 1903, but a decision on the motion was postponed. It is apparent from the brief of Plaintiffs in Error that the sole ground on which it is claimed that a federal question exists, is because their judgment lien was acquired prior to four months preceding the filing of the petition in bankruptcy, and that such liens are excepted from the operation of a discharge in bankruptcy and award of exemptions, and that this claim to immunity from the effect of the discharge in bankruptcy and award of exemptions was plead in paragraph three of the reply. (Plaintiffs' in Errors brief, p 17). While it could be urged with some force that the judgment lien of Plaintiffs in Error was not affected by the discharge in bankruptcy, yet there is no foundation for such a claim under the award of exemptions. The United States statute does not attempt to specify particularly what is or what is not exempt property, but the bankrupt is protected in all the exemptions which he is entitled to claim under the law of the state where the adjudication in bankruptcy has been made.

"This act shall not affect the allowance to bank-
"rupts of the exemptions which are prescribed by the
"State laws in force at the time of the filing of the peti-
"tion in the State wherein they have had their domicile
"for the six months or the greater portion thereof im-
"mediately preceding the filing of the petition."
(Bankrupt Act, Sec. 6.)

By Section 7 (8) of the Act of Congress relating to bankruptcy, it is made the duty of the bankrupt to

file schedules of his property, which schedules must contain "a claim for such exemptions as he may be entitled to."

The rights of a bankrupt to exempt property are exactly the same as are given him by the State statute, and if the exempt property is not subject to levy and sale under the State statute, then it is in no way charged to respond to such judgment lien under the Act of Congress relating to bankruptcy. Prior to the decision of this case by the Supreme Court of Washington, the same Court had held that a selection of exempt property might be made at any time before sale and that an execution sale thereof after such selection was ineffectual to pass title to the purchaser; that if no selection was made, but the property in fact was exempt, no title would pass to the purchaser at execution sale.

Wiss vs. Stewart, 16 Wash., 376.
Asher vs. Sekofsky 10 Wash., 379.

It follows from the construction which has been placed by the Supreme Court of Washington upon the statutes of that state, that if a selection of the property involved in this action, under claim of exemptton was made before a sale, Plaintiffs in Error acquired absolutely no title or interest in the real estate under the execution sale. If no selection was made under a claim of exemptions, but the real estate was in fact exempt from sale under execution, then no title or inter-

est could be, or was, acquired by Plaintiffs in Error as purchasers at the execution sale. What is and is not a proper selection or claim of exemptions under the laws of the State of Washington, is a question over which the Courts of that state have exclusive jurisdiction and their decisions are not subject to review by this Court.

From the opinion of the State Supreme Court it is at once apparent that the proceedings in bankruptcy, whereby Geo. F. Laugenour was discharged as a bankrupt, and this real estate was set aside as exempt, were only referred to for the purpose of ascertaing whether there had been an adjudication on the questions of exemptions. Under the decisions in *Wiss vs. Stewart*, *Supra*, and *Asher vs. Sekofsky*, *Supra*, if the property was in fact exempt, then the execution sale was void, irrespective of whether it had ever been claimed as exempt by Defendants in Error. The State Supreme Court examined into the regularity of the proceedings in bankruptcy for the sole purpose of determining whether there had been a valid adjudication of exemptions, and that is the only question relating to the bankruptcy proceedings that was ever considered or decided. The Act of Congress relating to bankruptcy does not attempt or purport to give Plaintiffs in Error any higher right under their judgment lien than the state statute affords. It was wholly immaterial to the decision whether the order awarding exemptions made by the District Judge related back to the date that the claim was made in the schedules in bankruptcy

or not, as the whole question was, whether a claim of exemptions had been made, whether the property was in fact exempt, or whether there had been an adjudication of exemption.

The Supreme Court of Washington in this case has held that the claim of exemption was properly made, and under previous rulings of that Court cited above, it necessarily followed that Plaintiffs in Error had acquired no right or title to the real estate in question by the execution sale. This is not a case where an exemption is claimed against a lien founded in contract where the parties have deliberately charged their property with the payment of an indebtedness, but where it is sought to wrest from Defendants in Error by the strong arm of the law, property which is exempt to them from seizure of levy under an ordinary judgment.

"If therefore, the property in question was exempt "from execution at the time the same was made under "execution issued on the respondents' judgment, the "respondents acquired no title thereto by their pur- "chase at the execution sale, and consequently have no "title on which they can maintain the present action. "Now the appellants were at liberty to establish this "fact in one or both of two ways. They could plead "the facts showing the property to have been exempt "from execution at the time of the sale, thus making "the question directly an issue in the state court, or "they could plead and prove that the question had been "once adjudicated between the parties in a Court of "competent jurisdiction, having the parties and the

"subject matter before it." (Opinion State Supreme Court, Trans., p. 26.)

The allegations contained in paragraph 3 of the reply of Plaintiffs in Error, out of which it is claimed the federal question arises, were not in any way material to the decision rendered by the State Supreme Court. The theory of Plaintiffs in Error as shown by said paragraph 3 was that because their judgment lien had been acquired prior to four months preceding the filing of the petition in bankruptcy, that therefore their judgment lien was not affected by the discharge in bankruptcy granted the bankrupt. For the purpose of argument, concede this to be true. In what way does that affect the rights of Defendants in Error to claim this real estate as exempt? A judgment lien is one question, and the right to enforce such judgment lien against exempt property is entirely another question. Plaintiffs in Error in their reply, do not claim that the Act of Congress relating to bankruptcy afforded them any immunity from the awarding of the exemptions authorized by the state statutes, but their claim was that their lien could not be taken away by the discharge in bankruptcy. This theory of the case was clearly recognized by the State Supreme Court wherein it is said.

"Lastly it is said that the order of the Court set-
"ting apart the property as exempt, does not purport
"to, nor does it in law effect existing liens upon the
"property set apart as exempt, and unless the liens

"thereon be such as the law voids of its own force, such "liens may be enforced in the State Court against and "to the extent of the property affected by the lien, "notwithstanding the order setting it apart as exempt, "and the discharge of the debt in bankruptcy. In cases "of lien which can exist independent of the question "whether or not the property is exempt, undoubtedly "the rule here invoked would be applicable; but the lien of "a general judgment is not such a lien. It is a lien "upon real property only, which is not exempt. Hence "if this property was exempt at the time of the filing of "the petition in bankruptcy, the judgment under which "it was sold was not a lien thereon and to assume that "the judgment was a lien, is to assume that it was not "exempt—the very question at issue." (Opinion State Supreme Court, Trans., p. 28.)

It appears too plain to require argument that the State Supreme Court did not in any way attempt to pass upon any right or alleged right of Plaintiffs in Error arising out of any federal statute. The decision is based solely upon the construction and application of state statutes, with which this Court has nothing to do. This is entirely borne out by the petition for rehearing filed by Plaintiffs in Error in the Supreme Court of Washington. An argument was made in that Court by Defendants in Error; (1) that by the discharge in bankruptcy, the lien of Plaintiffs in Error under their judgment was destroyed, under the provisions of Sec. 67f of the Bankrupt Act; (2) that even if the lien of the judgment was not destroyed by the discharge in bankruptcy, the execution sale was void because the real estate had been claimed by Plaintiffs in Error as exempt prior to the execution sale,

and the exemption had been allowed by the United States District Judge. The alleged federal question on which Plaintiffs in Error are relying, arises out of the first contention made by Defendants in Error shown above. This question was never passed upon by the Supreme Court of Washington as is shown by the last quotation from the opinion above, and from the following statement contained in Plaintiffs' in Errors petition for rehearing, as follows:

"Both parties assumed that the case would be de-
"cided by Section 67f of the act, to which this Court
"makes no reference." (Trans., p. 31.)

The Supreme Court of Washington having decided the case on other grounds than those involving the alleged federal question, this Court has no jurisdiction to review such decision.

The fact should not be lost sight of that before the execution sale, Plaintiffs in Error were notified of the proceedings in bankruptcy in the manner provided by the Bankrupt Act. Had they desired to contest the claim to exemptions, they could have done so; had they desired to appeal from the order of the District Judge in allowing the exemptions, they had that privilege; not having availed themselves of their right to contest the claim to exemptions in the District Court of the United States, or to appeal from the order made therein awarding the property as exempt, they are not now in a position to question the order adjudging the the real estate as exempt.

The only jurisdiction of this Court to review a final judgment of the Supreme Court of a state in a case of this character, arises under Section 709 of the United States Revised Statutes. It has been held repeatedly by this Court that no jurisduction exists over the final judgment of a State Court on a writ of error, except in the cases specified in said Section 709, and the exercise of such jurisdiction is limited by that Section with great care and in plain terms. It gives a writ of error where a party claims a title, right, privilege or immunity under a law of Congress, or authority exercised under the United States statutes, and the decision is against the right claimed. If it were a fact that a federal question was relied upon by Defendants in Error they would not be entitled to a Writ of Error unless the decision was against the right claimed.

The policy of Congress in giving jurisdiction to the Supreme Court of the United States to review decisions of the Supreme Courts of the different states has been to so restrict such jurisdiction as to simply enable the Federal Court to protect the general government from an invasion of its powers by a state government. Where a Federal Court has by adjudication, awarded any right or relief, and a State Court by its judgment enforces, recognizes or follows such adjudication, then the Supreme Court of the United States has no jurisdiction to review such action of the State Court, even though the previous action of the Federal Court so recognized and enforced by the State Court, was

erroneous or without jurisdiction. If the order of the District Judge setting this real estate aside to Geo. F. Laugenour as exempt, was erroneous or without jurisdiction, the State Court having recognized such order, this Court is without jurisdiction to review its decision.

Abbott vs. National Bank of Commerce, 175 U. S., 409.

Generally on the contention that no federal question is involved in this Writ of Error, we cite the following cases:

Baker vs. Baldwin, 187 U. S., 61.
Lynd vs. Lynd, 181 U. S., 183.
Linton vs. Stanton, 12 How., 423.
State of Missouri vs. Andriano, 138 U. S., 597.
Fulton vs. McAffee, 16 Pet., 149.
Calcote vs. Stanton, 18 How., 243.
Ryan vs. Thomas, 4 Wall., 603.
Roosevelt vs. Meyer, 1 Wall., 512.
De Lamars Nevada Gold Mining Co. vs. Nesbitt, 177 U. S., 523.

Plaintiffs in Error allege no facts in their reply showing that they claim any right, title, privilege or immunity under any statute or authority of the United States, which right, title, privilege or immunity so pleaded and claimed has been denied them by the State Court.

Hoyt vs. Thompson, 66 U. S., 518.

The Steamboat Victory, 73 U. S., 382.
Home for Incurables vs. New York, 187 U. S., 155.

Even if a federal question was raised, it is apparent from the opinion of the Court that it was not decided and the decision of such question was unnecessary to the opinion of the Court.

Chouteau vs. Gibson, 111 U. S., 200.
Murdock vs. Memphis, 20 Wall, 636.
Detroit City Railroad vs. Guthard, 114 U. S., 133.
Bridge Proprietors vs. Hoboken L. & I. Co., 68 U. S., 143.
Johnson vs. Rick, 137 U. S., 300.
County of Cook vs. Calumet & Chicago Canal Co., 138 U. S., 635.

The most that can be said by Plaintiffs in Error is that by paragraph 3 of their reply, they allege that their judgment lien was acquired prior to four months before the filing of the petition in bankruptcy, and was therefore not affected by the discharge in bankruptcy. As has been above shown, this question was not necessary to the decision of the State Court, was not passed upon, and was directly held to be immaterial to the decision of the case. (Trans., p. 28.)

Plaintiffs in Error have been left by the Supreme Court of the State of Washington in exactly the posi-

tion they were in before their execution was issued on April 12, 1899. Their judgment so far as it is affected by that decision, remains as it was, and is a lien on any property of Defendants in Error in Lincoln County, Washington, to the same extent as it would have been had said decision never been rendered, except that there is an adjudication protecting the real estate involved here as exempt to Defendants in Error under the laws of the State of Washington.

The laws of the State of Washington exempting homesteads are as follows:

"The homestead is exempt from execution or forced "sale except as in this chapter provided."

Sec. 5217 Ballinger's Ann. Codes and Stat. of Washington.

"The homestead is subject to execution or forced "sale in satisfaction of judgments obtained—

"1. On debts secured by mechanics, laborers or "vendors liens upon the premises.

"2. On debts secured by mortgages on the prem- "ises executed and acknowledged by the husband or "wife or by an unmarried claimant."

Sec. 5218 Ballinger's Ann. Codes and Stat. of Washington.

The argument made by Plaintiffs in Error at page 21 of their brief is a criticism on the state court for giving effect and force to the orders and decisions of the United States District Court. They are not complaining

because the State Supreme Court failed or refused to give effect or force to any order or decision of the United States District Court. The state court so far as it has passed upon any Federal statute or any order or judgment of a federal Court, has given full force and effect to such statute, order and judgment, and no authority of the United States Government has in any way been invaded.

Plaintiffs in Error are compelled even in their own brief to admit that their real grievance with the Supreme Court of the State of Washington is that "such exemption and denial being accomplished by the "holding of the State Supreme Court, that the order "of the bankruptcy Court, setting the property aside as "exempt, *was made with jurisdiction.*" Therefore, in order for this Court to retain jurisdiction, it is necessary to hold that a Federal question arises because force and effect was given to the order made by the United States District Judge setting this property aside as exempt.

If it should be held that the decision of the Supreme Court of Washington giving effect to the order made by the United States District Court awarding the real estate involved here as exempt, involves a federal question, such question was not raised in the pleadings of Plaintiffs in Error, and has never been raised until the writ of error was sued out. The contention of Plaintiffs in Error is that the federal question was pleaded in paragraph 3 of their reply in the state

Court. An examination of that paragraph of the reply will show that the alleged federal question on which Plaintiffs in Error are now relying, was not suggested in any way, until the filing of the petition for rehearing in the State Supreme Court and this was too late. (Trans., p. 29.)

Miller vs. Texas, 153 U. S., 535.
Weber vs. Rogan, 188 U. S., 10.

THE MERITS.

If any federal question exists in this writ of error, it is apparent that it is confined to that portion of the opinion of the State Supreme Court holding that there had been an adjudication made by the United States District Court that the real estate in controversy was exempt, and in holding that the Court making said order had jurisdiction. If this Court retains jurisdiction on the writ of error, then it would seem that the only question for decision would be whether the United States District Court in making the order setting this real estate apart as exempt was acting with jurisdiction. There was no appeal from that order, and the only time it has ever been questioned is in this Court. In the arguments made above by the Defendants in Error upon their motion to dismiss, necessarily the merits to some extent have been discussed, and the arguments there made will not be repeated here. We can make no stronger argument for the affirmance of

this case than the arguments advanced in the opinion of the State Supreme Court (Trans., 23). The reasoning of the State Supreme Court is logical, forceful and convincing. The claim of exemptions was properly made in the schedules in bankruptcy; Plaintiffs in Error were properly notified before the sale was made under execution, and no suggestion is made that any step taken was in any way defective except that it is contended that this exempt property should have been set aside by a trustee and not by the Court itself. These arguments have all been fully met in the opinion of the State Supreme Court. The rules in bankruptcy adopted by this Court provide that where no necessity exists therefor, a trustee need not be appointed. The bankruptcy court found that no necessity existed for the appointment of a trustee, and there could be no necessity for such appointment when the only property listed was claimed as exempt, and nothing remained to be done but to award such exemptions. Had a trustee been appointed his action in setting apart the exemptions would not have been final, but would have been subject to review by the District Judge.

The jurisdiction of a Federal Court cannot be attacked on a writ of error to a state court from this court, where the jurisdiction has been upheld.

In the case of *Abbott vs. National Bank of Commerce, Supra*, this Court said:

"Besides the decision of the same question by the

"State Court was in support of the jurisdiction of the "Circuit Court of the United States. Where the issue "is as to the validity of an authority exercised under "the United States we cannot review its determination "by the state court, *unless the decision was against the "validity of the authority so exercised.*"

If the motion to dismiss should be denied, then the State Supreme Court should be affirmed.

Respectfully submitted,

W. C. KEEGIN,
Counsel for Defendants in Error.

HERMAN D. CROW,
JAS. A. WILLIAMS,
Of Counsel.

Supreme Court of the United States.

No. 97.—October Term, 1904.

A. L. Smalley and F. McLellan, Plaintiffs in Error, vs. George F. Laugenour and Jane Laugenour. } In error to the Supreme Court of the State of Washington.

[January 3, 1905.]

This was an action of ejectment commenced in the Superior Court of Lincoln County, Washington, by A. F. Smalley and F. McLellan against George F. Laugenour and Jane Laugenour, (with two others, who subsequently ceased to be parties,) to recover possession of certain real estate situated in that county. The action was tried by the court without a jury, which filed findings of fact and conclusions of law, and rendered judgment for plaintiffs, whereupon defendants Laugenour carried the case by appeal to the Supreme Court of Washington. The judgment was there reversed and the cause remanded with directions to enter judgment for appellants, defendants below. 30 Wash. 307. This writ of error was then brought.

The facts were stated by that court in brief as follows:

"The appellants are husband and wife, and acquired the land in controversy as early as the year 1885. On March 16, 1895, the respondents and one L. J. Hutchings, as partners, recovered a judgment in the Superior Court of Lincoln County on a community debt against the appellant, Geo. F. Laugenour, for the sum of $363.45. On April 12, 1899, execution was issued on the judgment and levied on the land mentioned, under which, after due advertisement, it was sold at public auction to the respondents for the sum of $532.15, being the amount then due on the judgment. Thereafter the sale was confirmed by the court, and after the time for redemption had expired, a sheriff's deed was executed and delivered to the purchasers, which they caused to be recorded. On May 10, 1899, three days before the execution sale took place, the appellant, Geo. F. Laugenour, filed in the United States District Court for the District of Washington his voluntary petition in bankruptcy, in the schedule to which he listed the land in controversy, claiming the same as exempt under the bankruptcy act. On May 11, 1899, the referee in bankruptcy, to whom the proceedings had been referred, adjudged the petitioner a bankrupt, and thereupon gave to the creditors of the bankrupt, shown in the schedule attached to the petition, among whom were the respondents, the formal notice required by the bankruptcy act, notifying them of the adjudication of bankruptcy, of the time and place fixed for the first meeting of the creditors, that they might attend at such meeting, prove their claims, examine the bankrupt, and transact such other business as should properly come before the meeting. None of the creditors appeared at the time fixed

for the meeting; viz., June 5, 1899, and no trustee was elected or appointed; the referee finding that no necessity existed therefor. On August 9, 1899, the bankruptcy court entered an order discharging the bankrupt from all debts and claims made provable against the bankrupt's estate; and on August 12 'regularly made an order in said bankruptcy proceedings setting aside to said bankrupt as exempt under the act of Congress relating to bankruptcy, the real estate hereinbefore described, and awarding said real estate to the said bankrupt.' The court further found that since the execution sale the appellants had been in possession of the real estate, claiming to be the owners of the same; and for several years last past had resided in Spokane County, Washington, and that the real property, during the time, had been occupied by the defendant, Harry Gilliland, as their tenant. On the facts so found it ruled that the respondents were the owners and entitled to the possession of the premises, and entered judgment accordingly."

Mr. Chief Justice FULLER delivered the opinion of the Court:

The State Supreme Court, after calling attention to the statute of the State permitting a head of a family to select from his or her real property a homestead of limited value, and exempting it from the liens of general judgments and from execution or forced sale thereunder, Ballinger's Code § 5214, *et seq.*, and to previous rulings of the court that the selection might be made at any time before sale, *Wiss* v. *Stewart*, 16 Wash. 376, and that an execution sale thereof after such selection was ineffectual to pass title to the purchaser, *Wiss* v. *Stewart; Asher* v. *Sekofsky*, 10 Wash. 379, said: "If, therefore, the property in question was exempt from execution at the time the sale was made under the execution issued on the respondents' judgment, the respondents acquired no title thereto by their purchase at the execution sale, and consequently have no title on which they can maintain the present action."

And the court held that the order of the District Judge of the United States for the District of Washington, sitting in bankruptcy, awarding the property to Laugenour as property exempt from the claims of his creditors, and which related back to the time of the filing of the petition in bankruptcy, which was prior to the date of the attempted sale, was a judgment conclusive as between the parties that the property was so exempt at that date.

The State court was of opinion that Laugenour and his wife might have pleaded and proved facts showing that the property was exempt from execution at the time of the sale, making the issue directly in the State court, but, as they chose to rely on the principle of *res judicata*, that is, on the adjudication by the bankruptcy court, having jurisdiction of person and estate, in a proceeding in bankruptcy in which the judgment of Smalley and McLellan was provable, the court gave due force and effect to that adjudication.

The jurisdiction of this court to review the final judgments and decrees of a State court rests on section 709 of the Revised Statutes, and in this instance must be derived from the third division of that section, if it exist at all. And on the face of this record we cannot find that plaintiffs in error specially set up or claimed any title, right, privilege or immunity under the Constitution, or any statute of or authority exercised under the United States, which was decided against by the State court. What seems to be complained of is that the State Supreme Court accepted the judgment of the Federal bankruptcy court as having been rendered in the exercise of the jurisdiction with which it was vested.

Plaintiffs in error were notified of the proceedings in bankruptcy, as provided by the bankruptcy act, and, if they had desired to contest the claim to exemption, they might have done so, or could have invoked the supervision and revision of the order by the Circuit Court of Appeals, but they did not do that, and could not question its validity in the State courts, unless, indeed, it were absolutely void, which is not and could not be pretended.

The bankruptcy court is expressly vested with jurisdiction "to determine all claims of bankrupts to their exemptions." (§ 2, cl. 11.) Where there is a trustee he sets apart the exemptions, and reports thereon to the court, § 47, cl. 11; where no trustee has been appointed, under general order XV, the court acts in the first instance.

Section 6 of the bankruptcy act provided: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The rights of a bankrupt to property as exempt are those given him by the State statutes, and if such exempt property is not subject to levy and sale under those statutes, then it cannot be made to respond under the act of Congress.

In one of the paragraphs of the reply of plaintiffs in error (plaintiffs in the court of original jurisdiction) to the answer of defendants it was asserted that on the day their judgment was recovered Laugenour and his wife were the owners of the real estate in question, and the judgment became a lien thereon, and that "said lien, which culminated in the aforesaid sale of real estate to plaintiffs, was obtained and created pursuant to said suit, and more than four months prior to the filing of the alleged petition in bankruptcy;" and it is argued that this amounted to a special assertion of an immunity under the bankruptcy act. But immunity from what? Nothing more, at the best, than immunity from the discharge in bankruptcy; not from the exemptions authorized by the State statute. And so Fullerton, J., speaking for the State Supreme Court, said: "Lastly, it is said that

the order of the court setting apart the property as exempt does not purport to, nor does it in law, affect existing liens upon the property set apart as exempt, and, unless the liens thereon be such as the law avoids of its own force, such liens may be enforced in the State court against and to the extent of the property affected by the lien, notwithstanding the order setting it apart as exempt, and the discharge of the debt in bankruptcy. In cases of liens which can exist independent of the question whether or not the property is exempt, undoubtedly the rule here invoked would be applicable; but the lien of a general judgment is not such a lien. It is a lien upon real property, only, which is not exempt. Hence if this property was exempt at the time of the filing of the petition in bankruptcy, the judgment under which it was sold was not a lien thereon, and to assume that the judgment was a lien is to assume that it was not exempt,—the very question at issue."

We are not able to perceive that the State Supreme Court denied in any way a right of plaintiffs in error specially set up or claimed under the Constitution or laws of the United States. All that was determined, and all that the State court was called on to determine, was the question of exemption under the State statutes. Its acceptance of the judgment of the Federal court in that regard does not bring the case within section 709.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.